IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV 2021-404-000094
[2022] NZHC 3126

IN THE MATTER	of the Local Government (Auckland Transitional Provisions) Act 2010 and Resource Management Act 1991
BETWEEN	JOE GOCK and FAY GOCK Appellants
AND	AUCKLAND COUNCIL Respondent

Hearing:	21 June 2021 4 August 2021 supplementary submissions
Appearances:	A G Webb for Appellants T R Fischer & E M Moon for Respondents
Judgment:	28 November 2022

JUDGMENT OF DUFFY J

This judgment was delivered by me on 28 November 2022 at 4.00 pm pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

Solicitors/Counsel:
Simpson Grierson, Auckland
Wilson McKay, Remuera

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[1] The appellants, Mr and Mrs Gock, own 58 hectares of land at Pūkaki Peninsula, South Auckland. This land is currently in a rural production zone that lies beyond the Rural Urban Boundary (RUB) of the Auckland Unitary Plan (AUP). When the RUB was first drawn the Independent Hearing Panel (the Panel) recommended this land should be on the urban side of the RUB. However, the Auckland Council (the Council) excluded the Pūkaki Peninsula from the urban side of the RUB. The appellants have brought various challenges against this decision; the present appeal being their latest.[1] The Council opposes the appeal.

Background

[2] The Pūkaki Peninsula is situated along Pūkaki Road with the Auckland International Airport to the west and Ngā Kapua Kohoura (Crater Hill) to the east. The peninsula is bounded by the Pūkaki Creek and the Waokauri Creek and the Pūkaki volcano and public reserve is along the north eastern boundary. The Pūkaki and Waokauri Creeks are inlets of the inner Manukau Harbour.

[3] The appellants' land is a total of approximately 58 hectares held in 13 separate titles. Theirs is not the only land on the Pūkaki Peninsula that is affected by this appeal. There are other landowners of smaller parcels of land; they did not take an active role in this appeal.[2] Part of the affected land, including land owned by the appellants, has elite and prime soils. The presence of these soils was a key feature in both the 2018 EnvC decision and the 2020 EnvC decision.

[4] The appeal is the latest in a series of steps which began with the Panel that was appointed to formulate the provisions of the AUP. One of the Panel's tasks was to determine where the RUB should be drawn.

[5] The Pūkaki Peninsula and Crater Hill (Ngā Kapua Kohuora) are a sub-precinct of a larger area known as the Puhinui Peninsula. As outlined above, the panel's recommendation to the Council was that the RUB should follow the coastal margin of the Puhinui Peninsula. This would have seen the Pūkaki Peninsula and Ngā Kapua

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1 The right of appeal to this Court is governed by the Local Government (Auckland Transitional Provisions) Act 2010, s 158.

2 The other parcels of land are 6.7 ha; 2.02 ha and a marae and papakāinga zoned land.

Kohuora located on the urban side of the RUB. The Council rejected this recommendation, which left the Pūkaki Peninsula and Ngā Kapua Kohuora located on the rural side of the RUB.

[6] The Council's decision in relation to Ngā Kapua Kohuora and the Pūkaki Peninsula was subsequently upheld on appeal to the Environment Court (the 2018 EnvC decision).[3] That left the Pūkaki Peninsula zoned as rural production zone and the Pūkaki crater lagoon zoned open space informal recreational zone.

[7] This location of the RUB was set aside by the judgments of Muir J. Muir J delivered an interim[4] and a final judgment.[5] The appeal judgments of Muir J in relation to the Pūkaki Peninsula resulted in one of seven grounds of appeal against the 2018 EnvC decision being upheld. The Environment Court's decision in relation to Ngā Kapua Kohuora was upheld but Muir J allowed the appeal in part in relation to the Pūkaki Peninsula.[6] The proceeding was sent back to the Environment Court for re-consideration in accordance with the findings of Muir J.[7] The appellants' status in that appeal was as a s 274 party.[8]

[8] The relevant effect of Muir J's findings on the successful ground of appeal are summarised in his final judgment:[9]

> [14] In my interim judgment I found that the Environment Court had erred in:
>
> (a) the proper construction of the Regional Policy Statement (RPS), Chapter B2.2.2(2)(j) relating to elite and prime soils; and
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> (b) its assessment of whether the relevant areas on the Pūkaki Peninsula containing elite and prime soils were significant for their ability to sustain food production.

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3 *Self Family Trust v Auckland Council* [2018] NZEnvC 49, [2018] NZRMA 323 [2018 EnvC decision].
4 *Gock v Auckland Council* [2019] NZHC 276 [Interim judgment].
5 *Gock v Auckland Council* [2019] NZHC 1603 [Final judgment].
6 Interim judgment, above n 4.
7 Final judgment, above n n 5.
8 The Resource Management Act 1991, s 274 permits persons with specific interests recognised in that provision to participate as parties in an appeal before the Environment Court. This includes appeals to the Environment Court under s 56 of the Local Government (Auckland Transitional Provisions) Act 2010.
9 Final judgment, above n 5, at [14]–[16].

I also stated those errors to be material.

> [15] The identified error of construction was in respect of the phrase "significant for their ability to sustain food production" in RPS Chapter B2.2.2(2)(j). The Environment Court said that this qualified the reference to prime soils only with the result that, subject to a de minimis exception, the location of the RUB was required to avoid elite soils without reference to their significance in sustaining such production. I did not support that conclusion.
>
> [16] I also held that the Environment Court had erred in finding (effectively as a backstop to its primary position) that the principle of "incremental loss" was relevant to the location of the RUB when the question related to lands already surrounded by urban development.

[9] In the final judgment Muir J directed the Environment Court:

> [37]… to determine the proper location of the RUB on the Pūkaki Peninsula having regard to my interim judgment decision of 27 February 2019. In so doing I direct that the Environment Court is, in exercise of its powers under s 269(1) of the [Resource Management Act 1991] and in its discretion, entitled to consider further evidence in relation to satisfaction of RPS [Regional Policy Statement] criterion B2.2.2(2)(f). Save for any additional evidence the Environment Court chooses to admit in this respect, it is to reconsider the RUB location based on the evidence already heard by it.

[10] It is helpful to outline how the above references to Policies B2.2.2(2)(f) and (j) relate to the AUP. This is explained at [80] to [82] of the 2018 EnvC decision.[10] The AUP combines the Regional Policy Statement (RPS), the proposed regional coastal plan, the regional plan, and the district plan into one unitary plan. The AUP is divided into 14 chapters. Of those chapter B sets out the RPS, which is further divided into sections B1 to B11. Policies and objectives on urban growth and form are set out under B2. The B2.2.2 policies, which include B2.2.2(2)(a) to (m), relate to specifically to the location of the RUB.

[11] Policy B2.2.2(2) provides:

> (2) Ensure the location or any relocation of the Rural Urban Boundary identifies land suitable for urbanisation in locations that:
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> > (a) promote the achievement of a quality compact urban form
> >
> > (b) enable the efficient supply of land for residential, commercial and industrial activities and social facilities;

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[10] 2018 EnvC decision, above n 3, at [80]–[82].

(c) integrate land use and transport supporting a range of transport modes;

(d) support the efficient provision of infrastructure;

(e) provide choices that meet the needs of people and communities for a range of housing types and working environments; and

(f) follow the structure plan guidelines as set out in Appendix 1;

while:

(g) protecting natural and physical resources that have been scheduled in the Unitary Plan in relation to natural heritage, Mana Whenua, natural resources, coastal environment, historic heritage and special character;

(h) …

(i) ensuring that significant adverse effects from urban development on receiving waters in relation to natural resource and Mana Whenua values are avoided, remedied or mitigated;

(j) avoiding elite soils and avoiding where practicable prime soils which are significant for their ability to sustain food production;

(k) avoiding mineral resources that are commercially viable;

(l) avoiding areas with significant natural hazard risks and where practicable avoiding areas prone to natural hazards including coastal hazards and flooding; and

(m) aligning the Rural Urban Boundary with:

> (i) strong natural boundaries such as the coastal edge, rivers, natural catchments or watersheds, and prominent ridgelines; or
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> (ii) where strong natural boundaries are not present, then other natural elements such as streams, wetlands, identified outstanding natural landscapes or features or significant ecological areas, or human elements such as property boundaries, open space, road or rail boundaries, electricity transmission corridors or airport flight paths.

[12] The reference in Muir J's final judgment to allowing the Environment Court in the exercise of its discretion to receive more evidence in relation to Policy B2.2.2(2)(f) was made because in the 2018 EnvC decision that Court was critical of the adequacy of the appellants' evidence in terms of compliance with Policy B2.2.2(2)(f) – the requirement to follow the Structure Plan Guidelines. Muir J's direction gave the

appellants an opportunity to improve their evidence in relation to compliance with the Structure Plan Guidelines.

[13] Accordingly, the Environment Court that re-heard and delivered the 2020 decision was required to determine the proper location of the RUB on the Pūkaki Peninsula in accordance with: (a) the determinations of Muir J in the interim and final judgments; and (b) the determinations in the 2018 EnvC decision that were untouched by the interim and final judgments of Muir J.

[14] At the second hearing the Environment Court upheld the Council's decision (the 2020 EnvC decision).[11] The appellants had at this point amended the relief they sought for the location of the RUB. Now they want the RUB located on the northern side of Pūkaki Road between the existing urban boundary at the north western entrance to the peninsula and the southernmost corner of the land held by Savanah Holdings Ltd before turning in a north easterly direction along Savanah Holdings Ltd land as far as the tributary of the Waokauri creek that flows out of the Pūkaki Crater Lagoon.[12] This leaves the land owned by Savanah Holdings Ltd zoned as rural production zone and the remainder of the Pūkaki Peninsula zones as Future Urban Zone (FUZ).

[15] Therefore the rehearing before the Environment Court involved a reduced area of land to be included in the RUB urban area.[13] The affected land now comprises some 83.43 ha; if it is located within the urban side of the RUB this would see 78.96 ha subject to a FUZ and 4.47 ha subject to a Special Purpose-Māori Purpose Zone.[14]

[16] The present appeal then followed.

[17] The procedural history of this proceeding has affected the second round of hearings in both the Environment Court and this Court on appeal. Because there was no appeal against the judgments of Muir J I must respect and follow them where relevant to this appeal. However, where the 2020 EnvC decision contains

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11 *Gock v Auckland Council* [2020] NZEnvC 214 [2020 EnvC decision].

12 See 2020 EnvC decision, above n 11, at [255] and the attached "Pūkaki Spatial Plan" therein.

13 The reduced area excluded the Outstanding Natural feature area (the Pūkaki Crater/Lagoon), the urupā, the area fronting the Pūkaki Crater/Lagoon and the land owned by Savannah Holdings Limited; see 2020 NZEnvC decision, above n 11, at [20].

14 2020 NZEnvC decision, above n 11, at [18]–[22].

determinations based on that Court's assessment of any new evidence or new legal submissions that were not previously determined by Muir J, I am free to reach my own conclusions thereon.

[18] There is no dispute that the Environment Court's reconsideration could take account of any new evidence that was not before that Court at the first hearing. Thus there is common acceptance that updating evidence was permissible.

Parties' submissions

[19] Put shortly, the appellants submit that the elite soils issue is a standalone matter. In this regard, they argue that the 2020 EnvC decision applied the wrong test to interpreting Policy B2.2.2(2)(j). They argue that the 2020 EnvC decision does not apply the interpretation of Policy B2.2.2(2)(j) as found by Muir J; instead finding that *all* elite soils are significant for their ability to sustain food production. Second, the appellants submit that once the elite soils issue is dispensed with, the remaining issues (including mana whenua issues) that were determined in the 2020 EnvC decision should not be decisive of the location of the RUB.

[20] The respondent submits that the appellants' submissions fail to raise points of law. Instead they make unsustainable allegations in both law and fact; they improperly seek to involve this Court in assessing the merits of judgments made by the Environment Court in its specialist capacity; and their submissions focus narrowly on isolated policies (concerning soil or mana whenua issues), and contest the weight given to particular evidence, contrary to the wider statutory context of the AUP, including the RPS and the principles and purposes of the New Zealand Coastal Policy Statement (NZCPS).

[21] The respondent further submits that even if this Court finds the alleged errors concerning weight and considerations were made, these are immaterial to the validity of the decision.

Legal principles governing appeals from the Environment Court

[22] Appeals to the High Court from the Environment Court are governed by the Local Government (Auckland Transitional Provisions) Act 2010 (LGATPA)[15] and the Resource Management Act 1991 (RMA)[16] and are confined to questions of law. Section 299(1) of the RMA provides:

> A party to a proceeding before the Environment Court under this Act or any other enactment may appeal on a question of law to the High Court against any decision, report, or recommendation of the Environment Court made in the proceeding.

[23] Here the appeal is brought under s 158(4) of the LGATPA. The onus of establishing any errors of law rests on the appellant.[17]

[24] An error of law will only justify interference with a decision of the Environment Court where the Environment Court has:[18]

(a) applied a wrong legal test; or

(b) come to a conclusion without evidence, or to one which, on the available evidence, it could not reasonably have come; or

(c) taken into account matters which it should not have taken into account; or

(d) failed to take into account matters which it should have taken into account.

[25] The weight to be afforded to relevant considerations is a question for the Environment Court and not a matter available for reconsideration by this Court as a question of law.[19] On appeal this Court will not engage in a re-examination of the merits of the case under the guise of reviewing a question of law.[20] Where an error of

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15 Local Government (Auckland Transitional Provisions) Act 2010, s 158(4).

16 Resource Management Act 1991, s 299.

17 *Smith v Takapuna City Council* (1988) 13 NZTPA 156 (HC).

18 *Countdown Properties (Northland) Ltd v Dunedin City Council* (1994) 1B ELRNA 150, [1994] NZRMA 145.

19 *Moriaty v North Shore City Council* [1994] NZRMA 433 (HC).

20 *Sean Investments Pty Ltd v Mackellar* (1981) 38 ALR 363; and *Murphy v Takapuna City Council* HC Auckland M456/88, 7 August 1989. In *Transpower New Zealand Ltd v Auckland Council* [2017] NZHC 281 Wylie J held that the same principles apply to appeals under the Local Government (Auckland Transitional Provisions) Act 2010.

law is found, relief will only be granted where the error materially affected the result of the Environment Court decision.[21]

The grounds of appeal

[26] The notice of appeal identifies five broadly framed questions of law:

(a) Did the Environment Court apply a wrong legal test?

(b) Did that Court fail to take account of relevant considerations?

(c) Did that Court take account of irrelevant considerations?

(d) Did that Court reach conclusions that no reasonable Court could have reached?

(e) As a result of the foregoing was there a breach of natural justice?

[27] However, the notice of appeal also provides detailed particulars of various alleged errors of law that are said to give rise to the above questions of law. They are:

(a) The Environment Court applied the wrong legal test to its interpretation and approach to Policy B2.2.2 (2)(j) (concerning elite soils); namely by:

(i) failing or refusing to adopt the High Court's interpretation of Policy B2.2.2(2)(j);

(ii) incorrectly applying the test for information requirements to follow the Structure Plan Guidelines under Policy B2.2.2(f).

(b) The Environment Court failed to take account of relevant matters when discharging its obligations under the RMA and relevant planning documents namely by:

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[21] *Royal Forest and Bird Protection Society Inc v W A Habgood Ltd* (1987) 12 NZTPA 76 (HC) at [81]–[82]; and *BP Oil NZ Ltd v Waitakere City Council* [1996] NZRMA 67 (HC).

(i) failing to articulate and apply the correct test for quantity and quality of evidence required for the structure plan;

(ii) failing to consider/adequately weigh the appellants' evidence as to why consultation with mana whenua was not possible;

(iii) failing to consider the weight to be given to evidence from mana whenua that "any" development of land would cause adverse effects on cultural issues when mana whenua refused to consult with appellants or provide specific information about why the appellants' proposals were unsuitable.

(iv) failing to consider the appropriate weight to give to Council's social impact report written in consultation with mana whenua about potential effects of urbanisation without input from all four of the appellants' experts; and

(v) failing to properly consider or apply:

a. the Objectives and Policies under B2.2.1 and B2.2.2;
b. the overarching purpose of RPS within the hierarchy of regional and district level provisions;
c. the provisions in Chapters A and B1.

(c) The Court took account of irrelevant matters in determining how to apply the B2.2.2 Policies, namely by:

(i) erroneously holding that the location of the RUB must avoid elite soils, failing to recognise that requirement to avoid elite soils was not absolute, and should be considered in context of soil's significance to sustain food production; and

(ii) erroneously holding that Chapter B9 was relevant to the interpretation of B2.2.2(f) regarding elite soils.

(d) A breach of natural justice occurred as a result of the foregoing errors and because the Court:

(i) failed to properly consider the appellants' evidence about difficulties consulting with mana whenua and placed considerable weight on their failure to properly address issues about sites of significant and land gifting;

(ii) placed significant weight on blanket objection to urbanisation of land by mana whenua and failed to require mana whenua to consult with appellants to address/resolve concerns, despite the fact that the land is private land and the owners/appellants have the ability to control what happens on the land;

(iii) failed to make an interim decision including appropriate directions for proper consultation and provision of information;

(iv) deprived the appellants of the opportunity to address the failure of consultation issue before the final judgment, and criticised them for matters beyond their control.

(e) The Court's decision – that the most effective appropriate, efficient and effective way of achieving the purpose of the RMA was to exclude the subject land from the RUB – was so unreasonable that no reasonable Court could have made that decision.

[28] The relief the appellants seek is that the 2020 EnvC decision be set aside as unlawful.

[29] The subject matter of the pleaded errors of law is spread across the five questions rather than being discretely ordered under any one of the specific questions. Thus, there is a large degree of subject matter overlap between each question.

[30] I consider it is best if the various subjects are teased out and separately addressed with every question of law that is relevant to a specific subject being addressed under that subject heading. This is how the Environment Court approached the matter before it and I agree with its approach. I propose to do much the same albeit

with due recognition for the more limited type of appeal that an appeal on questions of law permits.

[31] I have adopted the following subject headings:

(a) The elite and prime soils issue;

(b) Mana whenua issues;

(c) The Structure Plan Guidelines issue; and

(d) Giving effect to the RPS/other issues.

[32] The 2020 EnvC decision hinges predominantly on the findings on the elite soil issue and then on findings on the mana whenua issues. The findings on the other issues were also influential, however, the outcome of this appeal is likely to turn on the conclusions I reach on the first two findings.

The elite and prime soils issue

[33] There are definitions of elite and prime soils in the AUP.[22] Land containing elite soil is classified as land use capability class 1 (LUC1). This land is defined as being the most highly versatile and productive land in Auckland, with the following features. It is well drained, friable and has well-structured soils; it is flat or gently undulating; and it is capable of continuous cultivation. It may be recorded as such by the New Zealand Land Resource Inventory (NZLRI), identified by site mapping, or be specified in Chapter J1. Land containing prime soils is identified as land use capability classes two and three (LUC2 and LUC3) with slight to moderate physical limitations for arable use. Factors contributing to this classification are: readily available water; favourable climate; favourite topography; good drainage and versatile soils easily adapted to a wide range of agricultural uses.

[22] See Auckland Unitary Plan, Chapter J1 (Definitions).

[34] Tellingly there is no definition in the AUP of what it means for elite or prime soils to be "significant for their ability to sustain food production."

Did the 2020 EnvC decision misinterpret Policy B2.2.2(2)(j)?

[35] The appellants accept the issue between them and the Council is whether the subject elite and prime soils are significant for their ability to sustained food production.

[36] The appellants argue that the 2020 EnvC decision either failed or refused to apply Muir J's interpretation of Policy B2.2.2(2)(j). Further they argue that the 2020 EnvC decision essentially found that all elite soils were significant for their ability to sustain food production. I reject these arguments.

[37] First, it is clear to me that the 2020 EnvC decision does not include the mistake that led the 2018 EnvC decision astray. The 2018 EnvC decision found that the reference to avoiding elite soils in Policy B2.2.2(2)(j) was not qualified by the subsequently specified requirement that those soils be "significant for their ability to sustain food production". On the other hand, the 2020 EnvC decision recognises that Policy B2.2.2(2)(j) expressly directs the avoidance of those elite soils that are significant for their ability to sustain food production. This finding accords with the interpretation of Muir J.

[38] Second, I consider the appellants misstate the 2020 EnvC decision's interpretation of Policy B2.2.2(2)(j). They argue the 2020 EnvC decision interprets the reference to elite soils in Policy B2.2.2(2)(j) as meaning that all elite soils are significant for their ability to sustain food production. I acknowledge that had the 2020 EnvC decision adopted this interpretation of "elite soils" in Policy B2.2.2(2)(j) this would essentially have the same practical effect as the interpretation that was adopted in the 2018 EnvC decision.

[39] There is no doubt the Environment Court was mindful that it must "apply the test the High Court has determined we must apply to the evidence."[23] It did this first

[23] 2020 EnvC decision, above n 11, at [47].

by reference to the subject soils, noting there was no dispute the areas of elite and prime soils on the Pūkaki Peninsula comprise 39.2 ha and 32.3 ha respectively, which together came to 71 ha or 68.8 per cent of the Pūkaki Peninsula. Nor was there any dispute that the soils were prima facie capable of growing crops. It identified the question in issue as being whether those soils had the requisite qualification imposed by Policy B2.2.2(2)(j), which was to be determined (as found by Muir J) in the context of the total area of elite and prime soils in the Auckland region.[24]

[40] I consider the 2020 EnvC decision spent considerable time addressing this question of whether the subject elite *and* prime soils have the necessary quality of being significant for their ability to sustain food production.

[41] Accordingly, I am satisfied the finding on elite soils in the 2020 EnvC decision is not based on a failure or a refusal to adopt Muir J's interpretation of Policy B2.2.2(2)(j). The remaining question is whether the 2020 EnvC decision has correctly applied this interpretation.

Was the Environment Court correct to conclude the subject soils were significant for their ability to sustain food production?

[42] The next enquiry is whether the 2020 EnvC decision was correct to conclude that the subject soils were significant to sustain food production.

[43] The appellants rely on Muir J's decision at [90]–[92]. They submit that Muir J found that the fact incremental loss of elite soils was occurring in the Auckland region was not relevant to the assessment of the significance of the subject soils for food production. Put another way, the significance had to be established first before incremental loss could be considered. Accordingly they say that the Environment Court in 2020 erred by using an incremental loss approach and therefore came to the wrong decisions concerning the soils' significance for food production.

[44] The Environment Court approached the question by identifying: (a) the erroneous approach taken in the EnvC 2018 decision;[25] (b) the criticisms that Muir J

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[24] At [49].
[25] At [39].

made of the 2018 EnvC decision, including those matters which the 2018 EnvC decision had failed to address[26] and those it should not have addressed.[27] Regarding the latter the Court reiterated that Muir J found the principle of incremental loss of elite and prime soils was an irrelevant consideration at the policy level associated with the location of the RUB. This in part was because, as the appellants state, until such soils were also identified as significant for their ability to sustain food production the relevance of their loss could not be ascertained.

[45] The Environment Court then addressed the submissions it had received from the parties. The appellants had submitted that avoiding elite soils was only necessary if it was first established those soils were also "significant for their ability to sustain food production". Such significance was to be tested against all the Auckland region's elite soils. They contended that the avoidance of elite soils was not an absolute, but rather something to be seen in the overall context of the soil's significance for its ability to sustain food production across the values for which elite soils are protected.

[46] In its submissions Auckland Council acknowledged the Environment Court must take into account the insignificant area concerned in the context of the total area of elite and prime soils in the Auckland region and, must not take into account the principle of incremental loss in the context of RUB location or relocation that involved lands already surrounded by urban development. However, Auckland Council further submitted that the assessment of significance should take into consideration what has happened already and what is expected to happen in the future. This was a matter about which the appellants objected both before the Environment Court and on appeal, where they argued the submission was no more than an attempt to introduce incremental loss as a consideration.

[47] The appellants and Auckland Council had also filed additional evidence on this topic for the reconvened hearing.

[48] The Environment Court's response to the submissions it heard was to find the "context" of change was not something that could easily or satisfactorily be addressed

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[26] At [41]–[42].
[27] At [43]–[45].

by adopting a simple ratio of areas as a single determinative criterion of significance.[28] The Environment Court went on to express its view on what it described as a quantitative approach to assessing the regional significance of elite and prime soils, as advanced by the appellants' expert Mr Putt.[29] It considered a quantitative approach to assessing regional significance first required a decision on what was the most appropriate quantitative base on which to make the assessment. This involved determining what regional comparator was most relevant to assessing whether or not the area of elite and prime soils on the Pūkaki Peninsula should be included within the RUB for future urbanisation or should remain outside it. It found that only one comparator had been advanced in the context of producing a regional percentage figure: this was the total area of land across the region containing elite and prime soils as identified when the soils classification criteria were last applied.[30]

[49] The Environment Court expressed concerns about the shortcomings of using a regional percentage figure calculated on that basis.[31] This was because that baseline took no account of the level of actual use of those soils for the critical purpose of sustainable food production and simply assumed that all such soils were equally substitutable. However there was evidence from experts that was not so, particularly when climatic differences were taken into account.

[50] The Environment Court also found such a baseline allowed for no consideration of the time dimension, and in that respect it was found to be arbitrary and simply reflected the total area of such soils remaining in the region at a certain point in time.[32] This was in the Environment Court's view a distinct limitation given the irreversibility of soil loss under urbanisation. Further, the Environment Court found the method of estimating quantitative significance to be manifestly incremental in nature. It was concerned by this because the Muir J had found an incremental approach was not appropriate in the policy context of plan development in coherent decisions on RUB location.[33]

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28 At [56].
29 At [57]–[65].
30 At [58].
31 At [59].
32 At [59].
33 At [59].

[51] Having identified the shortcomings of the above quantitative approach based on regional significance, the Environment Court then queried what other regional comparators might be appropriate. It identified two possibilities. First, to compare the affected parcel of elite and prime soils on Pūkaki Peninsula with the total area of elite and prime soils across the Auckland region that are presently becoming urbanised under the AUP. Second, and in the alternative, to compare this parcel of land on the Pūkaki Peninsula with the quantum of similar parcels of land with elite and prime soils in the region that will be consumed by urban development on average each year for the next 35 years.[34]

[52] The Environment Court described the purpose of identifying these alternative regional comparators as being to draw attention to the fact that different notions of "regional context" are possible and each would give rise to different quantitative estimates of regional significance. It considered neither of the alternatives it had outlined were measures of simple incremental change since they sought to compare the subject land on the Pūkaki Peninsula with the subset of other parcels of land that were similarly categorised as occupied.[35]

[53] In the Environment Court's view a quantitative approach to assessing regional significance did not remove the element of judgment on the appropriate basis for the assessment.[36] The Environment Court considered that any of the approaches it had identified for determining quantitative significance, including the approach advanced by the appellants' expert, Mr Putt, required a clear articulation of a related quantitative threshold of significance in the AUP process. It considered that before it could apply a quantitative approach it would first need to have an agreed basis for measuring the quantitative significance of the subject soils.[37] However, in the case it faced there was no agreed threshold of quantitative significance and in the Environment Court's view,

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34 At [60]. This time frame reflects the directive for the AUP to identify a quantum of land to be zoned for future urban development to meet 35 years' estimated demand.

35 At [61].

36 At [62].

37 At [63]. I do not accept that the basis for measuring the quantitative significance of the subject soils needed to be agreed. Often experts do not agree on the basis for their opinions. When this happens each expert must outline the basis for his or her opinion and the court then decides whether it will rely on this evidence. However, for reasons which I set out at [84]–[86] I do not consider a quantitative approach is available. Accordingly, albeit for different reasons, I agree with the Environment Court's rejection of Mr Putt's quantitative approach.

simple numbers taken without due regard to context were meaningless. Because the two alternative bases it had mentioned above were not put to relevant witnesses or the parties' counsel during the hearing, the Environment Court did not pursue those hypothetical alternatives. It referred to them simply to highlight how problematic it was to adopt a quantitative approach to the assessment of regional significance without establishing an agreed basis for comparison.

[54] The Environment Court then turned to what it described as the appellants' essential thesis, as outlined by their expert Mr Putt. This was:[38]

> The [Panel] had access to Dr Curran-Cournane's (Council's soil scientist) information on the extent of elite soils in the Auckland region which totalled 4,397 ha; which means the Gock elite soils are 0.6% of that total. In my opinion the conclusion of the Panel represents a balanced view, taking into account the Regional Policy Statement on land containing elite soils found in policy B2.2.2(2)(j).
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> …
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> Accordingly, it is clear that when considering whether the removal from food production of the 100 ha of elite and prime soils on Pūkaki Peninsula is an issue in terms of resource protection, the 63,000ha of those soils across the Auckland region is a backdrop to that decision. It is statistically an extremely small part of the elite and prime soil portfolio in the region.

[55] The Environment Court referred to Muir J's finding that the 2018 EnvC decision did not engage with Mr Putt's essential thesis at all.

[56] The Environment Court then found:[39]

> We now set out clearly our view that we do not accept that Mr Putt's quantitative assessment is relevant because it reflects explicitly an incremental perspective to evaluating significance. …

[57] Before the Environment Court Mr Putt had amended his original estimate of the regional percentage for the Pūkaki Peninsula land under appeal. Initially he had said this was 0.6 per cent but at the hearing he revised that figure to 0.07 per cent in light of Dr Curran-Cournane's updated soils classification data stating the difference was significant and helpful to the appellants' case.[40] In Mr Putt's view the subject

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38 At [66].
39 At [67].
40 At [68].

soils were so insignificant as to fall into the planning realm of de minimis. However, the Environment Court found Mr Putt's original evidence as compared with his supplementary evidence for the rehearing provided an example of how quantitative indicators of significance could vary by an order of magnitude depending on the selection of input data and assumptions.[41] The conclusion was that his revised estimate was no more persuasive than the original.[42] In the Environment Court's view the question of whether or not elite and prime soils of the Pūkaki Peninsula were significant for their ability to sustain food production was a matter of judgment and not something to be determined by a quantitative assessment.[43]

[58] Before turning to what it described as more qualitative aspects of the expert evidence on the subject soils, the Environment Court identified three other quantitative aspects that it considered worthy of address. These were: (a) whether or not a de minimis exception argument was relevant in the context of the Pūkaki Peninsula and the amended appeal; (b) the relevance of the cumulative loss of elite and prime soils over time; and (c) the implications of using the more accurate FARMLUC soils classification data when considering the decision of the Panel.[44]

[59] The Environment Court was satisfied the subject soils should not be considered de minimis in their extent. Thus it rejected this aspect of Mr Putt's evidence. It acknowledged the elite soils on Ngā Kapua Kohuora/Crater Hill were found to be de minimis, but the Environment Court considered that those soils were different from the soils on the Pūkaki Peninsula. First, because the soils on Ngā Kapua Kohuora contained 6.3 ha of elite soils and 44.4 ha of prime soils, comprising in total 45 per cent of that land, whereas, for the Pūkaki Peninsula there was 39.2 ha of elite soils and 32.3 ha of prime soils, which comprised a total of 69 per cent of that land.[45] Further, the prime soils on the Pūkaki Peninsula were almost entirely class 2 soils with several small peripheral areas of class 3 soils, while on Ngā Kapua Kohuora/Crater Hill the prime soils exhibited similar shares of class 2 and class 3 soils.[46] Secondly, on the

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41 At [69].
42 At [69].
43 At [70].
44 At [71].
45 At [73].
46 At [74].

Pūkaki Peninsula the class 1 and class 2 soils were largely contiguous across the entire peninsula creating a single area of productive land whereas on Ngā Kapua Kohuora/Crater Hill the areas of both class 1 soils and class 2 soils were fragmented and separated by class 3 and even lower class soils.[47]

[60] Further, the Environment Court noted that while the amended relief now excluded land owned by Savannah Holdings Ltd, which was some 13.4 ha of class 1 and class 2 soils, nevertheless any move to urbanise the remaining 58.1 ha of land under the amended appeal would render the Savannah Holdings Ltd land vulnerable to increasing reverse sensitivity pressures. Hence the long term outcome from the amended 2020 relief was, in the Environment Court's judgment, likely to be little different from that associated with the original relief sought in the 2018 EnvC decision. Further, with less than half the Savannah Holdings Ltd land having elite soils if the land with the subject soils were to be placed on the urban side of the RUB the Savannah Holdings Ltd elite and prime soils would then likely fall into the same de minimis category as the corresponding elite soils on Ngā Kapua Kohuora/Crater Hill.[48]

[61] The Environment Court then turned to consider the relevance of the regionally cumulative loss of soils over time, noting the parties adopted diametrically opposed positions on that question.[49]

[62] In its submissions Auckland Council focused on the broader regional context, not just at present but over time, and the effect of losing elite soils at Pūkaki Peninsula in combination with other areas of elite soils that have been lost across the region; stating this was relevant to the Court's decision. Whereas the appellants submitted that since the High Court did not accept the relevance of cumulative erosion on Auckland's elite and prime soils to urbanisation over time, that should be the end of the matter in respect of elite soils and any evidence on that issue should simply be put to one side.

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47 At [74].
48 At [75].
49 At [77]–[87].

[63] The Environment Court resolved this dispute first, by reference to what the High Court had said at [80] of its decision:[50]

> If, as urban Auckland expands, the areas of elite and prime soil were, on the premise of incremental loss, invariably excluded from the RUB, then the integrity and coherence of that boundary would inevitably be compromised, and spot zoning result. … The essential question in terms of B2.2.2(2)(j) was whether this land now fully surrounded by urban development, with the exception of its coastline, is significant in terms of its ability to sustain food production. That was not an inquiry in my view adequately answered **by reference to incremental loss**. Such would too significantly threaten the policy requirement for coherent RUB location.

[64] The Environment Court saw itself as bound by a categorical finding that it would be inappropriate for the Environment Court to inform any decision about the location of the RUB on the basis of the associated incremental loss of elite and prime soils that might occur as a result.[51] The Environment Court interpreted this directive as meaning it should focus attention on the broader context of regional effects over time and not limit its consideration to the significance of a single increment on its own.[52]

[65] The Environment Court then referred to a data set provided by Dr Curran-Cournane (which was the only data set available to the Court). This data set tabulated data on annual rates of loss of land with elite and prime soil over the period 1915 to 2010. It found that when that data was read in conjunction with the evidence about the quantities of such land that was being urbanised over the next 35 years (averaging 893 ha/year) the scale of cumulative loss of elite and prime soils became apparent.[53] It appeared that during the period of 1915 to 2010 a total of 7,172 ha of land containing elite and prime soils was lost irreversibly to urbanisation. The AUP currently provides for 31,270 ha of such land to be consumed during the next 35 years being more than a four-fold increase in one-third of the time recorded in the data. The Environment Court considered the change between past and present was even more pronounced for land containing elite soils only.[54] During the period of 1915–2010 a total of 343 ha of land containing elite soils was consumed by urbanisation whilst the

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50 Interim judgment, above n 4, at [91] (emphasis added by Environment Court).
51 2020 EnvC decision, above n 11, at [81].
52 At [82].
53 At [83] and [84].
54 At [84].

AUP currently provides for 6,632 ha of such land to be consumed during the next 35 years, being an almost 20-fold increase in one-third of the time.[55]

[66] Thus, it was evident to the Environment Court that the rate of occupation and consumption of elite and prime soils was accelerating.[56] However, it found that as with the use of regional percentage figures for determining regional significance, no identified thresholds were identified let alone agreed for addressing this irreversible cumulative loss of productive land resources.[57] This led the Environment Court to find it remained an exercise of judgment.

[67] The Environment Court next turned to consider the implications of using the FARMLUC soils classification data when considering decisions of the Panel. The appellants had argued that the analysis the Panel had undertaken supported its recommendations, provided a very important interpretive/assessment tool, and gave the best insight into how the recommendations were made in the first place and why they might have been rejected. For the Council, Dr Curran-Cournane's evidence provided data that was analysed using both the FARMLUC and the NZLRI LUC systems. She regarded comparisons against the FARMLUC classification as being the more accurate. Nonetheless she had included comparisons against the NZLRI. These were available at the time the Panel made its recommendations. Seemingly the FARMLUC classification was not available to the Panel.

[68] Dr Curran-Cournane identified what the Environment Court considered to be important differences between the evidence considered by the Panel and the evidence available to the Environment Court. Those differences were most pronounced for elite soils.[58] The Environment Court identified the "important differences" as follows. First, the FARMLUC data revealed there was more land containing elite soils across the region (19,459 ha) than the Panel was told (4,113 ha). This was almost a five-fold increase.

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55 At [85].
56 At [86].
57 At [86].
58 At [90] and [91].

[69] Second, the FARMLUC data revealed an even greater increase in the proportion of elite soils that were urbanised because of the Panel's zoning decisions: this was 6,632 ha compared with the earlier estimate of 869 ha that the Panel was aware of. Dr Curran-Courane said this a proportional increase from 21 per cent to 34 per cent; and it was almost an eight-fold increase in absolute terms.[59] The Panel had understood there were 869 ha of elite soils zoned as "occupied" land (meaning for future urban use), which was equivalent to just 1.5 per cent of all the rural land it knew to be zoned as "occupied". The updated evidence from Dr Curran-Courane showed 6,632 ha of elite soils were now zoned as "occupied", which was equivalent to 11.7 per cent of all the rural land in the region that was now known to be zoned as "occupied".[60] Thus the area of land containing elite soils that would be "occupied" under the AUP (6,632 ha) was more than one and a half times the area of all rural "occupied" land that the Panel had understood to exist across the region.[61]

[70] Third, the Panel expected its zoning for new countryside living to have avoided any areas of land containing elite soils in line with its recommended Policy B9.3.2(1). However, the FARMLUC data revealed that new countrywide living zones covered 362 ha of land containing elite soils; this was because of the Panel's decisions.

[71] The Environment Court said the foregoing information was unchallenged. It considered present information about the areas of land containing elite soils was fundamentally different from that which had informed the Panel's recommendation some years earlier. This led the Environment Court to conclude that the context for decision-making on the future use of land containing elite and prime soils had changed to an extent that now made the Panel's recommendation for the Pūkaki Peninsula land questionable.[62] There was now more current and more accurate data than was available to the Panel, and so the Court should make its decision based on the new data.

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59 At [91].
60 At [91].
61 The Panel seemingly understood the total area of this land across the Auckland region to be 4.113 ha.
62 At [94].

[72] The Environment Court then identified what it described as other contextual considerations in light of its finding that a simple "single" quantitative measure of regional significance such as a regional percentage figure was not considered an appropriate criterion by itself.[63] Here, it took into account three sub-topics: (a) what the soils classification system told it; (b) the comments of the soil experts from both parties regarding the attributes of elite soils generally and for the Pūkaki Peninsula in particular; and (c) the experts' comments about the future commercial viability of rural production activities particularly horticulture on the Pūkaki Peninsula. The Environment Court referred to the joint witness statement produced by the expert conferencing for soils and agricultural economics for the Pūkaki Peninsula on 19 April 2017. The conferencing had involved two experts for the appellants and two experts for Auckland Council.

[73] Importantly for the Environment Court, Dr Singleton, the soils expert for the appellants had agreed with the report and maps of the Pūkaki Peninsula soils produced by Dr Hicks, the soil expert for Auckland Council.[64]

[74] Considering the soil classification system, the Environment Court referred to Dr Hick's description of soils:[65]

> From a soil scientist's perspective, the land in the appeal area would be assessed as highly versatile (generally corresponding to 'elite') soil, or versatile (generally corresponding to 'prime') soil.

[75] Dr Hicks then discussed the specific criteria that soil scientists use to differentiate classes of soil and concluded:[66]

> A highly versatile soil meets all the criteria. A versatile soil meets most, but falls short on one or more. The limitation – greater slope, shallow rooting depth, etc – necessitates an adjustment to how the soil is managed. Where field examination of its soil (and other site characteristics) indicates all physical limitations are absent or negligible a site is classed as LUC1, defined as the most versatile multiple use land with minimal physical limitations for arable use … Where field examination indicates a limitation is present but slight, the site is classified as LUC2, defined as very good land with slight physical limitations to arable use readily overcome by management and soil conservation practices.

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63 At [95].
64 At [96].
65 At [97].
66 At [98].

[76] The Environment Court identified two factors which it considered relevant to assessing the significance of the subject soils for Policy B.2.2.2(2)(j). These were the character of the soils and their commercial viability. Regarding the character of the soils, the Environment Court accepted Dr Hicks' evidence that on the Pūkaki Peninsula, there was a predominance of LUC1 and LUC2 soils as well as the absence of fragmentation by lower class soils. It found this evidence was confirmed by Dr Singleton's agreement. It concluded that the soils on the Pūkaki Peninsula belonged in the category of the most versatile soils in the country.[67] The experts for both parties were agreed that these types of soil allowed cultivation of a wide range of crops. If there were soil management issues these could be rectified.

[77] Regarding commercial viability, there was some agreement among the relevant experts. The experts here were Ms Hawes, a horticultural consultant who gave evidence for the appellants, and Mr Ford, an agricultural economist who was a witness for the Council. Ms Hawes took account of the subject land being held in nine titles. She thought that on a stand-alone basis it was unlikely that each of the titles would be commercially viable for horticulture. So, if each title were to be sold to separate owners it would be very unlikely that each would find horticultural development on their individual title financially worthwhile. Mr Ford took a different perspective, noting that the effect of the nine titles and how they might constrain land use was unclear because all titles are held by the same owner and the land is farmed by a single operator. These experts agreed that the land could be leased at a higher rate than its present rent, which yields an extremely poor return on capital; and secondly, that an alternative was to realise the capital value by selling the land. In this regard the Environment Court observed that the viability of a farm should be assessed objectively rather than on a land-owner subjective view.

[78] The Environment Court found the two experts were ultimately agreed about the land's likely commercial viability stating:[68]

> In general, the soils are suitable and likely to be commercially successful for shallow rooting (example, salad greens; annual vegetables – plant once or more frequently per year; strawberries) and root vegetable crops (with appropriate soil management.

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67 At [100].
68 At [108]–[109].

[79] In conclusion, the Environment Court found there was no reliable evidence to quantify "significance". It expressed concern over the accelerating regional rates of "urbanising" of the most productive soil types, but noted there was no identifiable quantitative threshold in this context. It found it would be inappropriate to view the contiguous area of elite and prime soils on the Pūkaki Peninsula as a de minimis remnant. Whilst there was urbanisation extending south of the Pūkaki Peninsula the immediate environs of the Pūkaki Peninsula were not urban in character. The more accurate and recently available FARMLUC data supported the Court's findings. Accordingly, the elite and prime soils on the Pūkaki Peninsula were found to be not suitable for urbanisation. Further, the elite soils issue was found to be only one of the matters relevant to the overall question of whether the Pūkaki Peninsula should be identified as greenfield land suitable for urbanisation.

Analysis

[80] Whether there are elite and prime soils in the Pūkaki Peninsula that are significant for their ability to sustain food production is a mixed question of law and fact. It is a question of law insofar as the legal meaning of the phrase "elite and prime soils…which are significant for their ability to sustain food production" in Policy B.2.2.2(2)(j) needs to be ascertained and a test identified that will allow such soils to be recognised by a decision-maker. It is a question of fact as to whether soils in any given case have the necessary characteristics and therefore meet the tests for when soils can be recognised as being "elite and prime soils…which are significant for their ability to sustain food production".

[81] Neither in Policy B2.2.2(2)(j) nor elsewhere in the RPS is the meaning of the phrase "elite soils…and prime soils which are significant for their ability to sustain food production" stated. Nor are there any expressly stated considerations that could guide those responsible for ascertaining when such features are present or not. Instead the RPS leaves it to the decision maker to identify whether elite or prime soils meet the requisite qualification in Policy B2.2.2(2)(j). However, that is not to say a decision-maker is free to adopt whatever meaning he or she thinks appropriate. Ultimately it is for a Court to determine what the meaning of this phrase in Policy

B2.2.2(2)(j) is and it is the role of appellate Courts to determine whether that meaning is correct or not.

[82] Here the Environment Court considered Mr Putt's quantitative analysis and was not persuaded that it could offer a means of identifying when elite or prime soils can be said to be significant for their ability to sustain food production. The reasoning of the Environment Court on this topic is set out at [42]–[79] herein.

[83] The weight the Environment Court chose to place on Mr Putt's evidence was a matter for that Court to determine. The weight a decision-maker attributes to evidence can only lead to error if that weight is such that no reasonable decision-maker in the circumstances could have reached that view, but not otherwise.[69] I do not consider the rejection of Mr Putt's evidence can be characterised as something no reasonable Environment Court would have done. Indeed I consider there are sound reasons for rejecting a quantitative approach for identifying elite and prime soils that have the requisite significance.

[84] First, as the Environment Court correctly recognised a quantitative approach to assessing significance requires a comparator to be identified. Here there was none. Nor can I see how such a comparator could be identified. The data on soils that Mr Putt relied on was data recording land with elite and prime soils simpliciter located in the Auckland area.[70] He had no way of knowing how much of that land had soils with the additional characteristic of being significant for their ability to sustain food production. This additional qualification is not part of soil classification data, rather it derives from Policy B2.2.2(2)(j).

[85] Policy B2.2.2(2)(j) requires only those elite and prime soils that are significant for their ability to sustain food production be avoided when deciding the location or relocation of the RUB. For this qualification to make sense and have meaning, rather than being a tautology, it must be understood to imply the existence of a group of elite and prime soils that are not significant for their ability to sustain food production. In

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69 *Issac v Minister of Consumer Affairs* [1990] 2 NZLR 606 at 635, citing *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 66 ALR 299.

70 See [48]–[50] herein.

other words, only some elite soils are significant for their ability to sustain food production and some others are not. Policy B2.2.2(2)(j) therefore requires the identification of one group from the other.

[86] By taking the quantity of elite soils in the Auckland region as known from soil science data and comparing this number to the quantity of elite soils in the Pūkaki Peninsula Mr Putt was comparing the latter soils against a mix of elite soils that likely included elite soils which are significant to sustain food production in the Auckland region and elite soils which lack this characteristic. The same applies in the case of prime soils. Accordingly, Mr Putt's quantitative analysis was flawed from the outset.

[87] Second, soil science classification defines LUC 1 soils as those that are the most highly versatile and productive land in Auckland, having the features of being well drained, friable and well-structured soils, being flat or gently undulating and being capable of continuous cultivation. It is difficult to see what more such a soil could have to qualify as being significant in its ability to sustain food production. It is also difficult to see how some elite soils can meet the definition in LUC 1 but still be said to lack the requisite significance for food production. Both groups will meet the LUC 1 criteria, but one group has something else that sets it apart from the other in relation to its significance for sustaining food production. The question is to identify what it is that sets one group apart from the other.

[88] I think there is a readily distinguishing feature between elite soils that are significant for their ability to sustain food production and those elite soils that lack this feature. The same goes for prime soils. It is to be found in looking at the extrinsic factors that can affect the use of those soils. The Environment Court touches on this when it found the class 1 and 2 soils on Ngā Kapua Kohuora/Crater Hill were fragmented and separated by class 3 and even lower soils, whereas the Pūkaki Peninsula class 1 and 2 soils were largely contiguous across the Peninsula creating a single area of productive land.[71]

[89] It is obvious that a contiguous single area of productive land will be easier to utilise for food production than a fragmented area of productive land. This factor has

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[71] See [59] herein.

nothing to do with the productive character of the soil itself but rather how it is positioned in relation to other soils. Similarly, elite and prime soils that suffer adverse extrinsic effects such as contamination from earlier uses or vulnerability to chemical drift damaging to crops can be excluded from food production for this reason.

[90] Also, elite or prime soils that are located in parts of the Auckland region that may be considered remote in terms of transport to market and access to labour and other services may be excluded from food production due to these extrinsic factors.

[91] There are many extrinsic factors that could adversely impact on the intrinsic significance of elite and prime soils to sustain food production. This in turn would either remove or reduce any benefit of protecting them from urban development. It also means that groups of elite and prime soils that are unaffected or minimally affected by extrinsic adversities will necessarily be soils that have greater significance for their ability to sustain food production than those in the same soil class that suffer adverse extrinsic affects. When read in this way, the purpose of the qualification in Policy B2.2.2(2)(j) protects those elite and prime soils with no adverse extrinsic characteristics from loss to urbanisation while at the same time potentially allowing for urbanisation of elite or prime soils that have lost their significant abilities for sustaining food production.

[92] Mr Putt had also opined that the subject soils were de minimis. The Environment Court rejected this argument.[72] Before this Court the appellant's counsel advised that there was no challenge to this finding.

[93] The arguments the appellants advanced for the subject soils not meeting the requirements of Policy B.2.2.2(2)(j) rested on Mr Putt's quantitative analysis and his opinion that the subject soils were de minimis. Both arguments were rejected by the Environment Court for tenable reasons. The de minimis finding is not challenged. I have outlined why I consider the Environment Court's rejection of Mr Putt's quantitative analysis was a finding that was open to that Court to make. The appellants had no further arguments to support the view the subject soils were not significant for their ability to sustain food production. They could not point to any extrinsic factors

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[72] See [59] herein.

that would undermine the soil's significance for food production. This left them without evidence to support their case.

[94] On the other hand, the Council produced evidence that supported the subject soils having the requisite significance. This evidence was relied on by the Environment Court. Again, the weight the Environment Court chose to place on the Council's evidence was a matter for the Environment Court, so long as it was reasonable.

[95] I am satisfied there is nothing unreasonable in the Environment Court's weighing of or reliance on the Council's evidence. The reasoning process of the Environment Court is described at [42]–[79] herein.

[96] The Council's experts adopted a qualitative approach to identifying elite and prime soils with the requisite qualification of significance. The Environment Court accepted this was the correct approach. It found that the decision on whether the subject soils had the requisite qualification was a matter of judgment rather than something that could be derived from statistical analysis. Based on the evidence that was before that Court this was a reasonable and available conclusion for it to reach.

[97] The Environment Court correctly recognised it could not, in light of Muir J's judgment, adopt an incremental approach to loss of elite and prime soils of significance.[73] Instead, it took a broader view that had regard to the accelerating rate of loss of elite and prime soils across the Auckland region as outlined by Dr Curran-Cournane. Her evidence was based on updated data that had become available since the Panel's decision. The new data gave the Environment Court cause for concern.[74] I consider it was open to the Environment Court to take account of this matter.

[98] The Environment Court then identified what it described as contextual considerations. It accepted the evidence of Dr Hick that soils in the Pūkaki Peninsula have a predominance of LUC 1 and LUC 2 soils as well as the absence of

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73 See [44] and [63]–[64] herein.
74 See [65]–[66] herein.

fragmentation by lower class soils. The Environment Court was satisfied based on Dr Hick's assessment, which it saw as being reinforced by Dr Singleton's stated agreement that the subject soils were the most versatile soils in the country. The next issue was their commercial viability. There was some agreement between the experts. They agreed the appellants' land could be leased and at a higher rate than at present. They agreed that the subject soils were likely to be commercially successful for shallow rooting and root vegetable crops.[75] This assessment of the commercial viability of the land is consistent with considering whether there were extrinsic factors relating to its commercial viability that would detract from its ability to be significant to sustain food production.

[99] No specific issue was identified by the appellants in the Environment Court that would detract from the subject soils' significance for food production. Ms Hawse had considered the fact the subject soils were in a property that comprised nine legal titles made it unlikely that separate owners for each title could use their land horticulturally on a financially worthwhile basis. But the Council's expert disagreed with Ms Hawse's reservation about the multiple legal titles. His view was that all titles were currently held by one owner; thus, the constraints Ms Hawse had identified do not currently apply.

[100] The fact the nine legal titles show the soils to be legally fragmented may have been a potential external adverse factor that detracted from the significance of their ability to sustain food production. However, the Environment Court decided in this respect that: (a) the experts were agreed the land could be leased and return a higher rate than currently was charged; and (b) in reliance on the 2018 EnvC decision, the Environment Court found that the viability of a farm should be assessed objectively rather than on a landowner's subjective view. It preferred the evidence of the Council's expert rather than Ms Hawse. Accordingly, the Environment Court was not concerned by the legal fragmentation of the soils. The point was recognised by the Environment Court and dealt with. The Environment Court took an objective view of the appellants' land based on its current form. There was expert evidence to support this view. It is not for this Court in an appeal on a question of law to contradict a

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[75] See [78] herein.

factual finding by the Environment Court based on expert evidence before it. Further I agree with the finding. If the significance of elite and prime soils' ability to sustain food production could be reduced by an owner's failure to utilise such soils commercially, an owner's subjective view of how such land should be used, or the legal configuration of its titles, the purpose of Policy B2.2.2(2)(j) would be undermined.

[101] No other factors of the type I have identified as adversely affecting the significance of elite and prime soils to sustain food production were identified. Nor can they be seen from reading the evidence that was before the Environment Court. I am therefore satisfied that no such evidence exists.

[102] The point about the "significance" qualification in Policy B2.2.2.(2)(j) being based on an absence of adverse extrinsic factors rather than something positive that would identify those elite and prime soils having the additional character of being significant for their ability to sustain food production was raised on more than one occasion with the appellants' counsel Mr Webb during the exchange between bench and bar at the hearing of this appeal. There was in my view ample opportunity for him, given he had been involved from the outset in this matter to address this point before me. It could be expected that an experienced counsel like Mr Webb who has been involved in a matter which spans two appeals before the Environment Court and two appeals to this Court would have identified and addressed any evidence that detracted from the significance of the soils in terms of their ability to sustain food production if it existed. On no occasion has such evidence been produced.

[103] The decision to reject the Panel's recommendation and instead locate the subject soils outside the urban area of the RUB was made by Auckland Council. The appellants have challenged that decision by exercising their appeal rights. The main thrust of their appeal was that the subject soils were not the type of soils affected by the direction in Policy B2.2.2(2)(j). In the 2020 EnvC decision the evidential basis on which the appellants' appeal to the Environment Court rested was found by that Court to be wanting. On this basis alone the Council's decision would therefore stand. In *Ngati Rangi Trust v Genesis Power* Ellen France J in the Court of Appeal referred to

the principle that a person who wants the Court to take action must prove his or her case.[76]

[104] In addition, other evidence at the rehearing satisfied the Environment Court that the subject soils met the necessary qualification in Policy B2.2.2.(2)(j). Those conclusions were well founded for the reasons I have outlined herein.

[105] In such circumstances it is not surprising that the Environment Court found that on the elite and prime soils issue the Pūkaki Peninsula was not suitable for urbanisation. It is important to note however that the Environment Court did not treat this finding as decisive of the appeal before it. It went on to consider other relevant factors.[77] These are addressed below.

Mana whenua issues

[106] Mana whenua issues arise in more than one context. Policy B2.2.2(2)(g) requires the location of the RUB to identify land suitable for urbanisation in locations that:

> (a) promote the achievement of a quality compact urban form;
>
> …
>
> while
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> ...
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> (g) protecting natural and physical resources that have been scheduled in the [AUP] in relation to natural heritage, Mana Whenua, natural resources, coastal environment, historic heritage and special character.

[107] Also relevant to mana whenua issues are Chapter B6 (Mana Whenua) and Guidelines 1.4.2(1), 1.4.3 and 1.4.4(2) of the Structure Plan Guidelines (in Appendix 1 of the AUP, forming part of the RPS). In the 2020 EnvC decision the Environment Court addressed the mana whenua issues in relation to each of those considerations. For the purposes of the appeal I consider it more helpful to draw those considerations

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[76] *Ngati Rangi Trust v Genesis Power* [2009] NZCA 222, [2009] NZRMA 312 at [23]. The judgment is a minority judgment, however, that does not detract from this statement of principle, which was not in issue in the appeal.

[77] See 2020 EnvC decision, above n 11, at [116].

together under one heading so that mana whenua issues are addressed as a discrete topic.

[108] The 2020 EnvC decision considered the findings in the 2018 EnvC decision on mana whenua issues, the judgments of Muir J in relation to those issues, the submissions and the additional evidence that was called at the rehearing.

[109] In the 2018 EnvC decision the Environment Court held:[78]

> Crater Hill and Pūkaki Peninsula are part of a cultural dimension to the area which is very important. The importance lies not only in the individual sites (both identified and unallocated) but in the area as a whole as identified as sub-precinct H in the Puhinui Structure Plan. This case is really the last gasp for Te Ākitai and their Mana Whenua; if they cannot retain the sub-precinct with the current land use zoning that is inherently far more sympathetic to the mauri of the land, than would be the case with residential or light industrial development over significant portions, they will lose the cultural dimensions of this area (ie their cultural landscape) as a whole. We conclude that maintaining the status quo RUB is essential for sustaining the existing quality of naturalness, and thereby the mauri of the small remaining undeveloped parts of Te Ākitai's rohe.

[110] Before Muir J, the appellants argued that the Environment Court had failed to take into account relevant matters, including how the proposal to include land within the RUB would provide a pathway through structure planning and consultation with mana whenua for mana whenua to recognise and provide for the matters in ss 6(e), 7 and 8 of the RMA. The Self Family Trust (who did not advance arguments in this appeal) had argued before Muir J that the 2018 EnvC decision had wrongly determined issues relating to mana whenua against the weight of the evidence. The trustees alleged there were errors in determining how to discharge obligations under ss 6(e), 7 and 8 of the RMA, and Chapter B6 (Mana Whenua).

[111] In this Court, on mana whenua issues Muir J concluded that the Environment Court:[79]

> … had not erred in law either in its assessment of Te Ākitai's position in relation to the appeal, the reasons for its position or the implications of its opposition, inter alia, of B6.3.2(6).

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78 2018 EnvC decision, above n 3, at [532].
79 Interim judgment, above n 4, at [200].

[112] Te Ākitai provided supplementary evidence at the rehearing. This evidence was consistent with and supportive of its evidence at the first Environment Court heading.

[113] At the rehearing the Environment Court's understanding was that Muir J upheld the finding in the 2018 EnvC decision that retaining the present rural zoning would better recognise and protect Te Ākitai's values. It treated the weight to be given to the 2018 EnvC decision, as it applied to Te Ākitai's position, as a matter for further consideration, bearing in mind the remission back of the elite soils issue and the need to address the structure planning guidelines issues.[80]

[114] At the rehearing counsel for the appellants submitted that Muir J had seen mana whenua issues as playing a supporting role to the elite soils issue, and because the elite soils issue was no longer an impediment to urbanisation, mana whenua issues conceivably ought not be either. Counsel did, however, accept that Muir J did not rule out relief being granted on mana whenua objections alone. However, Muir J left this as a matter for the Environment Court to determine on remission to that Court.

[115] The outcome of the rehearing was not as counsel for the appellants anticipated. The appellants' argument on the elite soils issue was rejected. Thus the Environment Court was never faced with deciding whether the outcome of the appeal might turn on its decision on mana whenua issues alone.

[116] At the rehearing the appellants acknowledged what they described as Te Ākitai's implacable opposition to any urbanisation or development of the land. They submitted that this position amounted to the iwi stating that the land is part of a Māori "cultural landscape" of significant value to Te Ākitai and, therefore, any urbanisation of that land would have an adverse effect on this landscape and should not occur. The appellants further argued that this concept of a "cultural landscape" was not recognised by the AUP. Rather, the AUP enables particular sites of cultural significance to be scheduled, which is the way that natural and physical resources in relation to mana whenua are to be protected. The appellants submitted that this approach was reflected in Policies B2.2.2(2)(g) and (i), and in the Structure

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[80] At [201]; and Final judgment, above n n 5, at [32]–[37].

Plan Guidelines (Guidelines 1.4.2(1) and 1.4.3(1)). Accordingly, the appellants' submissions analysed the Chapter B6 (Mana Whenua) issues through this lens. Their submissions reiterated that scheduling[81] was a protection mechanism provided for in the AUP, that related only to sites, places and areas, but not landscapes.

[117] On the other hand, the Council argued that the concept "cultural landscape" was raised in its evidence-in-chief for the 2018 Environment Court hearing, and it was not challenged by any evidence to the contrary, nor was it opposed in submissions before the Environment Court. The findings in the 2018 EnvC decision on "cultural landscapes" were not tainted by any error. Counsel submitted the concept was part of the 2018 EnvC decision and this aspect of the decision was not appealed to the High Court. Accordingly the Council's view was that it is not open to the appellants to now raise this issue through what is effectively a backdoor challenge to the 2018 EnvC decision.

[118] In the alternative, the Council submitted that "cultural landscapes" are captured in the wording of the RPS as confirmed by this Court in *Independent Māori Statutory Board v Auckland Council*.[82]

[119] The Council's final point in relation to the "cultural landscape" argument was that even though this phrase is a well understood and convenient concept, accepting it as such it was not essential to the Environment Court's findings because the test was whether the appellants' proposal would give effect to Chapter B6, which the Council submitted it would not. The Council relied on the 2018 EnvC decision as confirmation:

> [498] ... Culturally, the Pūkaki Peninsula is, with Crater Hill on the other side of Waokauri Creek, the last piece of the continuous land/water interface that is the rohe of Te Ākitai. It may be difficult for landowners to accept that, but it is a matter of national importance for the Auckland Council to both recognise and provide for "the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga" and that is reflected in the RPS.

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81 Schedule 12 to the AUP records sites and places of significance to mana whenua. These sites and places are specifically protected in Chapter B6.

82 *Independent Māori Statutory Board v Auckland Council* [2017] NZHC 356, (2017) 19 ELRNZ 721; NZRMA 195 at [115], [116] and [80]–[83].

[120] On rehearing, further evidence on mana whenua issues was provided by Mr Denny and Ms Wilson for Te Ākitai, Ms Trenouth for the Council, and Mr Putt and Mr Gibb for the appellants. This evidence traversed the history of Te Ākitai as mana whenua of the Pūkaki/Puhinui area as confirmed in the Wai 8 Report[83] and as also acknowledged by other parties at the hearing. This evidence included how land was confiscated in 1863 following the land wars. Mr Putt accepted that the land was indeed confiscated from the Te Ākitai iwi, but then later returned to individuals of that iwi.

[121] Ms Wilson is a member of the Te Ākitai Waiohua Waka Taua Incorporated, Chair of the Pukaki Māori Marae Committee and Chair of Te Ākitai Waiohua Iwi Authority which is mandated to negotiate Treaty settlement claims against the Crown on behalf of their iwi. She gave evidence for the 2018 EnvC decision and on rehearing her evidence responded to planning evidence given by Mr Putt. She confirmed Te Ākitai Waiohua as mana whenua and kaitiaki for the Pūkaki Peninsula and contended that persons who had discussions with Mr Putt on mana whenua issues were not mandated to speak on behalf of the Pūkaki Marae or Te Ākitai Waiohua interests. This was acknowledged by Mr Putt in his second supplementary statement of evidence where he referred to the persons he had spoken with earlier as having informed him they did not feel they had authority to call a meeting to discuss matters and would continue to rely on the Te Ākitai Iwi Authority to bring such matters to the attention of the Te Ākitai iwi members.

[122] Ms Wilson's evidence referred to a meeting with the appellants. Her evidence was that Te Ākitai remained strongly opposed to the urbanisation of the Pūkaki Peninsula because of cultural impacts. Whilst Te Ākitai supported structure planning as a process they did not support urbanisation of Pūkaki Peninsula, particularly where a large part of the "cultural landscape" would likely be occupied by light industrial development. Ms Wilson gave evidence as to what the iwi would consider to be the irreparable and permanent adverse effects of urbanisation.

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83 Waitangi Tribunal *The Manukau Report* (Wai 8, 1985).

[123] Mr Denny provided two sets of evidence for the rehearing. His first summarised the areas of cultural relevance to Te Ākitai Waiohua and his second explained the cultural relevance of the Pūkaki Peninsula to Te Ākitai Waiohua:[84]

> … Pūkaki Peninsula is viewed more as a cultural motu (Island) of traditional lands that has not been absorbed into the encroaching urban environment yet and represents all that Te Ākitai Waiohua have left as a legacy and lasting example of sustained use occupation of ancestral whenua within the broader cultural landscape.

[124] Mr Denny viewed Pūkaki Peninsula as unique and a substantive opportunity to protect and preserve the cultural values and wider landscape of the area. In his view, urbanisation over the long term would not improve the ability of iwi as kaitiaki to protect waahi tapu, or preserve the mauri of land or cultural landscapes holistically to achieve inter-generational aspirations of rangatiratanga for Te Ākitai as an iwi to exercise kaitiakitanga (guardianship), wairuatanga (spirituality), whanaungatanga (kinship connections) and kotahitanga (wholeness).[85] In Mr Denny's opinion, the appellants' spatial plan did not provide the means to achieve those values. He rejected Mr Putt's view that "the beneficiary of these actions is effectively the mana whenua — in this case Te Ākitai. Their environment will be enhanced significantly." To the contrary, in Mr Denny's view, the potential benefits from urbanisation and environmental enhancements did not outweigh the loss of cultural values associated with Pūkaki Peninsula and the wider "cultural landscape".

[125] The Environment Court found that the evidence from the two witnesses for Te Ākitai Waiohua was that the iwi remained unconvinced the appellants' spatial plan would address the concerns of Te Ākitai Waiohua.

[126] At the rehearing the appellants submitted that development within the present rural zoning could have a higher impact on Te Ākitai than development in their proposed light industrial zone.[86] Mr Webb submitted that under the present rural zoning Te Ākitai's interests in the Pūkaki Peninsula would not be protected. Mr Webb provided the Environment Court with lists of activities that were permitted in the present rural zoning. However, the Environment Court rejected these arguments. It

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84 2020 EnvC decision, above n 11, at [309].
85 At [311].
86 The present zoning is known as a rural production zone.

found there was no clear evidential base to support them. Ms Trenouth, the planner called by the Council, was questioned about this aspect of the appellants' arguments. Her view was that the proposed light industry zone allowed for the greater likelihood of subdivision into small lots with placement of large buildings, which was unlikely if the land remained in its existing rural zone. Ms Trenouth also referred to contrasting provisions for side yards and building heights between the present rural zoning and the proposed light industrial zone as factors which would influence the overall character differences between rural and urban zone development.

[127] The Environment Court accepted that any comparison of the effects of the existing rural zone with the proposed light industrial zone required each option to be approached with equal consideration of future prospects. Nonetheless, that Court was not persuaded by the appellants' contention that permitted rural activities would have far greater adverse effects on the land than would the proposed light industrial activities. In this regard the Environment Court considered the appellants' comparison of the two zone outcomes took insufficient account of the differences in potential scale, bulk and density of built development, brought about by the differences in rural and industrial subdivisions, building height and side yard provisions.

[128] The Environment Court found there was merit in the Council's argument that the issues being raised by the appellants in relation to "cultural landscape" were matters that were fully traversed in the 2018 EnvC decision, and unsuccessfully appealed to the High Court both in relation to Chapter B6 issues and what had become known at the rehearing as the "cultural landscape" issue.

[129] Further, the Environment Court also found that the appellants' arguments about the difference between kaitiakitanga and mauri were addressed by Muir J who had specifically dealt with the argument that kaitiakitanga could be exercised through structure planning, as had occurred during the Puhinui Structure Plan process.

[130] The Environment Court found that the remission back was not an opportunity to re-open matters that had already been determined, or to re-run

unsuccessful arguments made before Muir J. The Environment Court further found that the supplementary evidence from Mr Denny and Ms Wilson on the appellants' spatial plan confirmed that the urbanisation of the Pūkaki Peninsula would have a significant impact on mana whenua values, which those witnesses considered could not be mitigated.

[131] The Environment Court rejected the appellants' submission that the AUP provisions protected only sites of cultural significance rather than "cultural landscape". In this regard it agreed with the Council's submission that the concept of cultural landscape is captured in the wording of the RPS, as was recognised in *Independent Māori Statutory Board v Auckland Council*.[87] This led the Environment Court to conclude that the AUP enables the concept of a "cultural landscape" to be considered in the context of mana whenua values, and the Court was not limited to considering those values only in relation to sites of significance to mana whenua within that landscape. The Environment Court considered this meant that even though some of the Structure Plan Guidelines referred to sites of significance, to give effect to the RPS, the wider perspective of the "cultural landscape" also needed to be assessed. The Court noted that the concept of "cultural landscape" was an inherently European concept because in Te Ao Māori, people, hapū and iwi are inextricably linked to their landscape. In other words, the landscape is not seen as separate from the person, hapū or iwi.

[132] As a matter of caution the Environment Court noted that insofar as it might be argued that evidence of mana whenua values could result in something akin to veto rights if established, Muir J had specifically articulated, analysed, and rejected this argument in his interim judgment.[88]

[133] In the alternative the Environment Court found that even if it was wrong in its interpretation of "cultural landscape", it accepted the Council's submission that it was not essential to the Court's decision because the test is whether the appellants' proposal will give effect to the mana whenua values in Chapter B6. The 2018 EnvC decision found that it would not, and the appellants' spatial plan, and the evidence in relation to

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87 *Independent Māori Statutory Board v Auckland Council*, above n 82.
88 2020 EnvC decision, above n 11, at [285]–[286].

it, did not in the Environment Court's view detract from the 2018 EnvC decision's findings. Four reasons were given to support this view. They were:

(a) The protection of sites of significance on the Pūkaki Peninsula was insufficiently addressed by the spatial plan and it was not appropriate to leave these matters to later discussion.

(b) The appellants' offer of land to mana whenua was no more than an expression of possible intention, which was not made to the right representatives of the Te Ākitai nor could it be relied on given its contingent character.

(c) Access to urupā remained problematic.

(d) There was a wider issue of impact of urbanisation on the cultural values of Te Ākitai which had not been addressed.

[134] As regards the last reason the Environment Court referred to the 2018 EnvC decision which recognised that:[89]

> … if Te Ākitai's values in "their" landscape have been reduced by the proposed development of southern Puhinui (as they claim), then that makes any remaining values even more important.

[135] Moreover, the 2018 EnvC decision in relation to Chapter B6 had found that the importance of the cultural dimension was the area as a whole; moving the RUB and rezoning the land would undermine the existing quality of naturalness and the mauri of the area.[90]

[136] The Environment Court on rehearing was satisfied that it could not ignore that as a result of the unsuccessful appeal to the High Court, which had resulted in Ngā Kapua Kohuora/Crater Hill being excluded from the RUB the link between it and the Pūkaki Peninsula as a cultural motu unsuitable for urbanisation was further strengthened.

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89 At [267], citing 2018 EnvC decision, above n 3, at [496].
90 2018 EnvC decision, above n 3, at [532] (citations omitted).

[137] The Environment Court concluded that the appellants' spatial plan did not substantively change the fundamental conclusion of the 2018 EnvC decision, which had upheld the Council's decision in relation to the Pūkaki Peninsula as better recognising and protecting Te Ākitai's values than would the appellants' proposal. The Environment Court was also satisfied the evidence from the cultural witnesses at the rehearing confirmed and strengthened the cultural evidence that was considered in the 2018 EnvC decision. As to the appellants' rebuttal evidence, in the Environment Court's view this evidence did not weaken the evidence supporting protection of Te Ākitai's values through excluding the Pūkaki Peninsula from the urban side of the RUB. Accordingly, the Environment Court found there was no basis for departing from conclusions reached in the 2018 EnvC decision in relation to mana whenua values; if anything, the importance of them has been reaffirmed and further cemented by the evidence received at the rehearing.

[138] As mentioned before, mana whenua issues also arise in the context of the structural guidelines. Accordingly, I now deal with those issues.

Guideline 1.4.1(5)

[139] Guideline 1.4.1(5) provides that a structure plan should address opportunities to improve access to landlocked parcels, including Māori land. The Environment Court found this guideline was directly relevant to access to the urupā as there was no formal access to the urupā from Pūkaki Road. There was only a current informal arrangement to access it over the Savannah Holdings Ltd land which under the amended spatial plan was excluded. Mr Putt had accepted that an important outcome of the future structure plan at the live-zoning stage of the process[91] would be to ensure full legal access to the urupā. His view was that could be achieved on the northern side of the Gock property, formalising existing informal arrangements. The Environment Court was critical of Mr Putt because after having identified full legal access to the urupā as an important issue he had neither investigated nor assessed it any further, and instead considered it was something to be addressed later. On the other hand, Ms Trenouth had disagreed with Mr Putt's approach. Her view was that because the land over which access was proposed to occur was excluded from the

[91] Where future urban zoned land becomes urban (business or residential) zoned.

RUB, it was therefore excluded from future structure planning. In her view it was difficult to see how access would be addressed or formalised later. The Environment Court expressed its shared concern with Ms Trenouth about the certainty of access to the urupā being resolved later.

[140] Ms Trenouth had also identified a further impediment to access, which was that even if an esplanade reserve was established at the southern end of the proposed RUB it could not extend along the Savannah Holdings Ltd site because that land could not be subdivided. The Environment Court also referred to the supplementary evidence of Mr Denny, who had said that direct access from the appellant' land was not possible. He said:

> The natural land features of the area — namely a substantial ditch, the Waokauri Creek esplanade reserve and the rim of Pūkaki Crater — prevent direct access to the urupā from Gock land.

[141] In his rebuttal evidence, Mr Putt had reiterated his opinion that there would be ample opportunity through future structure planning to resolve the issue of formal legal access to the urupā. He contended that the urupā was not landlocked because it had an access, although unconstructed, from Pūkaki Road around the western edge of the crater to the urupā site. He explained that his reference to the possibility of access on the northern side of the appellants' property, which he described as "a coastal route", had potential and could be a focus for the FUZ structure plan, among others.

[142] The Environment Court found the appellants had provided insufficient detail to meet Guideline 1.4.1(5). Further, it found this guideline to be important. Put shortly, the Environment Court thought that having formal legal access to the urupā was something that ought to have been investigated and addressed in more detail at the present stage of the process rather than being left to a future structure plan process if, indeed, it would then be able to be addressed at all. The Environment Court acknowledged that Guideline 1.4.1(5) only refers to opportunities to improve access to landlocked parcels which was not a requirement to provide such access. However, its view was that how much information should be provided to identify, investigate, and address this topic was a question of scale and degree. However, because of matters which it later addressed in more detail regarding mana whenua

the Environment Court was not satisfied that Guideline 1.4.1(5) had been sufficiently investigated and addressed at this stage of the process.

Guidelines 1.4.2(1) and (2)

[143] Guideline 1.4.2(1) provides that a structure plan should identify, investigate and address "the protection, maintenance and enhancement of natural resources, particularly those that have been scheduled in the Unitary Plan in relation to Mana Whenua, natural resources, and the coastal environment". Under Guideline 1.4.2(2) the structure plan must also demonstrate "how the proposed subdivision, use, and development will protect, maintain and enhance the values of the resources identified in [Guideline] 1.4.2(1)". The Environment Court referred to evidence it heard from Mr Putt and Ms Trenouth. The Environment Court concluded that natural resources relating to mana whenua had not been identified, investigated or addressed by the appellants' evidence to a sufficient degree at the present stage of the process. However, this finding was also relevant to Guideline 1.4.4(2)(b) and the Environment Court left any further comment to when it addressed that guideline. Accordingly, I shall revisit the Environment Court's conclusions on Guidelines 1.4.2(1) and (2) when dealing more broadly with the mana whenua issue below from [157].

Guideline 1.4.3 – natural and built heritage

[144] Under Guideline 1.4.3, the structure plan must identify, investigate and address the existence of natural and physical resources that have been scheduled in the Unitary Plan in relation to natural heritage, mana whenua, natural resources, coastal environment, historical heritage and special character. The key issue for the Environment Court was the existence of natural and physical resources in relation to mana whenua. Mr Putt dealt with this guideline in his supplementary evidence. In his view there was no scheduled natural heritage in the area identified for inclusion within the RUB; he identified six items of significance to Te Ākitai, which he accepted were heritage matters. His view was those matters could readily be managed in the proposed spatial plan. He referred to the appellants having made a preliminary offer of land to Te Ākitai, which was linked to the appeal succeeding.

He also described the appellants as having a good relationship with the Pūkaki Marae representatives and Te Ākitai.

[145] The Environment Court found that the appellants had shown a willingness to respect and acknowledge sites of significance to Te Ākitai, including being prepared to gift land to the iwi. However, the offer had not been advanced and was dependent on an appeal outcome favourable to the appellants.

[146] Ms Trenouth had dealt with Guideline 1.4.3 together with Guideline 1.4.4(2)(b) together in her supplementary evidence. Her opinion was that both of these guidelines require two elements of heritage to be addressed. The Environment Court decided to refer to both matters in the analysis when dealing with Guideline 1.4.4(2)(b). Accordingly, I shall do the same.

Guideline 1.4.4 – use and activity

[147] This guideline sets out seven matters to be addressed by a structure plan. Both Mr Putt and Ms Trenouth agreed that the relevant part of the guideline was 1.4.4(2)(b) especially in relation to recognising mana whenua values.[92] Mr Putt's evidence was these matters can be managed through the use of esplanade reserve provisions, and sympathetic treatment of land to serve the Te Ākitai hapū needs well into the future, including potential ownership of new land. Ms Trenouth described this aspect of Mr Putt's evidence as a "sweeping statement" which did not in her view meet the requirements of the guidelines to identify, investigate and address relevant matters. In her view, given the relatively small scale of the area and the availability of the Cultural Heritage Assessment report prepared by Te Ākitai, it should have been possible for the appellants to respond to cultural values more comprehensively at this stage of the process, albeit she accepted that the heritage items would need to be managed through future detailed structure planning. The significance of the cultural values and how

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92 Guideline 1.4.4(2)(b) provides that a structure plan must identify, investigate and address "the adoption of standard Unitary Plan methods and provisions where possible to ensure a consistent approach across the region by … recognising the values of natural heritage, mana whenua, natural resources, coastal, historic heritage and special character through identification of sites of places to be scheduled and the use of existing overlays in the Plan".

development might impact on them had been highlighted in the 2018 EnvC decision.

[148] Ms Trenouth's opinion was that the assessment against these guidelines needed to address two key elements of heritage, being the Pūkaki Crater/Lagoon and the mana whenua values of the "cultural landscape". The Environment Court observed there was agreement between the experts that the Pūkaki Crater/Lagoon should be excluded from the RUB, however Ms Trenouth's opinion was that urban development would nonetheless have potentially adverse impacts on it. Here she referred to evidence of Mr Brown about landscape effects.

[149] Mr Putt's opinion was that the proposed new urban edge along Pūkaki Road could be managed by way of landscape design and management techniques, such as buffers, developed as part of a future structure plan.

[150] Ms Trenouth accepted that matters such as building height, yards and setbacks could be addressed as part of a future structure plan. However her view was that the current structure plan should have considered this. Accordingly, her opinion was that the implications of urbanisation had not been adequately considered. She acknowledged that the guidelines specifically require *scheduled* sites to be considered. Her view was that there was a need to identify sites or places of value that *should* be scheduled, and in her opinion these had not been addressed to a sufficient degree at this stage of the process.

[151] Mr Putt's evidence and the submissions of the appellants' counsel were that the guidelines only required scheduled sites to be considered. Ms Trenouth's point was that Policy B6.5.2(7) must be read in conjunction with the Guidelines. This policy seeks the inclusion of a Māori cultural assessment in structure planning and plan change processes to identify mana whenua values associated with the landscape; identify sites, places and areas that are appropriate for scheduling; and reflect mana whenua values. Ms Trenouth's view was that mana whenua values associated with the landscape are referred to as the "cultural landscape". Mr Brown's opinion was that the spatial plan provides no more than a cursory response to the cultural landscape.

[152] There was also evidence from Mr Denny which confirmed the sites identified through the cultural heritage assessment were significant as part of a "cultural landscape" and as such segregating the site and surrounding land with urbanised development would not address the values associated with the landscape.

[153] Ms Trenouth was critical of Mr Putt's assessment, which in her view did not consider mana whenua values at all but instead outlined land ownership opportunities. Further, she contended that Mr Putt had not assessed the potential impacts of urbanisation on Te Ākitai's values, including the "cultural landscape". Her view was that the potential for increasing the landholdings presented by Mr Putt would not address Te Ākitai's cultural values in relation to the Pūkaki Peninsula, or to the wider cultural landscape that incorporates Ngā Kapua Kohuora/Crater Hill.

[154] The Environment Court agreed with Ms Trenouth that Policy B6.5.2(7) was relevant as well as Guidelines 1.4.4(2)(b) and 1.4.3(1). For the Environment Court this made the concept of "cultural landscape" relevant.

[155] In relation to Guideline 1.4.4(2)(b) the Environment Court found it was designed to address the consistency of approach across the region by use of standard methods and provisions. Further, the Environment Court agreed with Mr Webb that this part of the guideline dealt with the identification of sites or places to be scheduled in the future in order to recognise the mana whenua values. The Environment Court considered the focus of the guideline was on the methods and provisions that are to be used to achieve this, with such methods and provisions ensuring consistency of approach across the region.

[156] The Environment Court found that other than offering land to mana whenua if their appeal was successful the appellants had done little at this stage of the process to signal how the provisions of Guidelines 1.4.3(1) and 1.4.4(2)(b) would be achieved. In the Environment Court's view it was not appropriate to leave the detail of how the requirements of those guidelines would be achieved to a later day. This was particularly so given the importance of the sites within the overall "cultural landscape" of importance to Te Ākitai. The Environment Court found it had not been provided

with any evidence to help it assess the consistency issue because it did not receive any evidence about the methods and provisions in the spatial plan that would be used to achieve consistency.

Analysis

[157] First, the 2020 EnvC decision found that Muir J had rejected the appellants' challenge to the findings in the 2018 EnvC decision on the mana whenua issue. I agree with that conclusion. In this Court Muir J was uncertain as to whether the Environment Court might have found that its decision on the mana whenua issues alone was enough to warrant dismissing the appeal, thus leaving the Council's decision on the location of the RUB intact. It was one of the reasons the matter was remitted back to the Environment Court for reconsideration rather than being determined by Muir J. Of course, the 2020 EnvC decision reached the same view on the elite soils issue as in the 2018 EnvC decision, but based on reasons that accorded with Muir J's interpretation of Policy B2.2.2(b)(j). Against this background there is little strength in the arguments the appellants advance in this appeal on the mana whenua issue.

[158] On appeal to this Court the appellants were critical of the Environment Court for failing to consider or to adequately weigh the appellants' evidence as to why consultation with Te Ākitai was not possible. They further argue that the Environment Court failed to consider the weight to be given to evidence from Te Ākitai that any development of land would cause adverse effects on cultural issues. They complain that Te Ākitai refused to consult with them or provide specific information about why the appellants' proposals were unsuitable. The appellants also argue that the Environment Court failed to consider what weight should be given to the Council's social impact report which was written in consultation with Te Ākitai about potential effects of urbanisation, but without input from the appellants' experts.

[159] The appellants contend that a breach of natural justice has occurred because the Environment Court failed to properly consider the appellants' evidence about the difficulties they had consulting with Te Ākitai and placed considerable weight on their failure to properly address issues about sites of significance and land gifting. They argue the Environment Court placed significant weight on a blanket objection to

urbanisation of land by Te Ākitai and failed to require Te Ākitai to consult with the appellants to address or resolve concerns, despite the Pūkaki Peninsula being privately owned land and the appellants as owners having the ability to control what happens on that land. The appellants are critical of the Environment Court for failing to make an interim decision giving appropriate directions for proper consultation and provision of information. They contend the Environment Court has deprived them of the opportunity to address the failure of consultation and criticised them for matters beyond their control.

[160] The appellants' arguments on the mana whenua issues overlook the fact that to the extent their earlier appeal to this Court challenged findings on mana whenua issues in the 2018 EnvC decision they failed before Muir J. Where such findings were not challenged they must stand. It follows that, albeit for separate reasons, all findings of the 2018 EnvC decision on mana whenua issues still stand.

[161] The only new question on mana whenua issues before the Environment Court on rehearing was whether the findings on mana whenua issues in the 2018 EnvC decision could be decisive on where the RUB was located. As it turned out, following the rehearing the Environment Court gave multiple reasons for why the RUB should remain where the Council has placed it. This conclusion rests not only on the findings on mana whenua issues in the 2018 EnvC decision, but on findings on other matters. Further, the additional evidence the Environment Court heard on the mana whenua issues from Te Ākitai simply confirmed their evidence in the 2018 EnvC decision.

[162] The Environment Court's assessment of the supplemental evidence from the parties on the guidelines discussed above shows it considered the evidence that was available to it. No error arises as a result of its assessment.

[163] Following the hearing of this appeal additional submissions were filed which included an attempt by the appellants to argue that the stance taken by Te Ākitai on the mana whenua issues was analogous to that taken by the iwi party in *Ngati Rangi Trust v Genesis Power Ltd v Ngati Rangi Trust*.[93] I am satisfied the present case is distinguishable from *Ngati Rangi Trust v Genesis Power Ltd*.

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93 *Ngati Rangi Trust v Genesis Power Ltd*, above n 76.

[164] In *Ngati Rangi Trust v Genesis Power Ltd* the iwi concerned had failed to specify measures that would mitigate the adverse effects of the diversion of part of the Whanganui River headwaters into Lake Taupō and then into the Waikato River. Genesis Power Ltd operated the Tongariro power development scheme which diverted the headwaters in this way. The Regional Council had granted Genesis Power Ltd a 35 year resource consent to continue the diversion. There was no question diversion was necessary. However, the Environment Court accepted that the diversion of the headwaters substantially prejudiced Ngati Rangi Trust's cultural and spiritual values. For this reason it reduced the term of the consents to 10 years to allow a "meeting of minds" between Genesis Power Ltd and Ngati Rangi Trust on long term mitigation solutions.

[165] On appeal to this Court it was held that the "meeting of the minds" concept was an improper test created by the Environment Court to fill an evidential gap which existed because Ngati Rangi Trust had failed to specify measures that would mitigate the adverse effects of the diversion.

[166] On further appeal a majority of the Court of Appeal found the sole reason for shortening the period of the consent was that Ngati Rangi Trust had difficulty articulating their concerns on diversion and how they wanted them to be met. The Environment Court thought they should be given more time to respond. However, instead of adjourning the hearing to give Ngati Rangi further time to address its evidential difficulties the Environment Court reduced the time frame of the consent on the basis the parties might over that time reach a common position. Young P found the effect of the Environment Court's decision was to give Ngati Rangi Trust another chance to produce a better case.[94]

[167] Young P also found the Environment Court had given Ngati Rangi Trust "a distinct leg-up by indicating (at least implicitly) that a long-term consent will only be granted if accompanied by mitigation measures which are the product of a meeting of the minds." In his view the RMA envisages that disputes will be resolved by hearing authorities, including the Environment Court, and in accordance with the provisions

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94 At [45].

of that Act rather than in the way proposed in the Environment Court judgment. He considered that instead the Environment Court ought to have fixed the mitigation conditions or left them to be fixed by the review process.

[168] Chambers J was similarly critical of the "meeting of the minds" construct. Before the Court of Appeal Ngati Rangi Trust argued that the absence of evidence relating to Māori values and interests was essentially the fault of Genesis. The argument was that Genesis chose to challenge the veracity and extent of the Māori values, and did not accept that the effects on Ngati Rangi Trust were other than minor. Ngati Rangi Trust argued that if Genesis had properly engaged with them prior to the hearing and had been prepared to accept the effects on Māori values were more than minor there could have been a principled assessment of what was required to mitigate adequately the adverse effects. Accordingly, Ngati Rangi Trust's submission was that it was the failure of Genesis to engage pre-hearing that led to the Environment Court ordering engagement post-hearing. This argument was rejected in this Court by Wild J and by the majority of the Court of Appeal. It was found to be based on false assumptions. Genesis was found to be entitled to question the Māori values Ngati Rangi Trust considered were affected and Genesis was entitled to argue the effects on Ngati Rangi Trust were minor. That was an issue for the Environment Court to resolve.

[169] Chambers J found that if Ngati Rangi Trust failed to engage on a second tier argument regarding mitigation of the adverse effects then they ran the risk that the mitigatory proposals advanced by Genesis would be accepted by the Environment Court. He explained that litigation is frequently multi-layered and parties are not entitled to assume that only the first layer will be dealt with; they need to engage on every issue which is before the court at that time. Secondly, he considered Ngati Rangi Trust's arguments on appeal were based on the assumption that Genesis was under a legal obligation to engage with Ngati Rangi Trust prior to the hearing. Whilst that was something to be encouraged it was not a statutory requirement of an application for a resource consent. Applicants for resource consents were entitled, at the end of the day, to say to their opponents: we'll see you in court. If an applicant failed to engage with their opponents prior to trial, that did not in any way absolve the opponents from engaging with all the issues arising. The time for the principled assessment of what was required to adequately mitigate the adverse effects was the hearing before the

Environment Court, not some later hearing in ten years' time. Accordingly Chambers J found:

> [62] The Environment Court was bound to evaluate the application in light of the fundamental purpose of the Act, namely the promotion of "the sustainable management of natural and physical resources": s 5. It had to do that on the basis of the evidence before it, in light of relevant policy statements, plans and proposed plans. If the court considered it had insufficient material before it to enable a proper evaluation of certain effects, then it would have been appropriate to adjourn the hearing to enable further evidence of a defined character to come before it. Alternatively, it was bound to decide the matter on the basis of what was before it. In that regard, it must be remembered that resource management law is not "black letter" law: there will always be more evidence that could be called on every application or appeal. Decision-making bodies in this area often have to make decisions based on incomplete data.
>
> [63] What the Environment Court was not permitted to do was grant a consent, which apparently it thought might not meet Māori concerns, but then arbitrarily shorten the term of the consent in the hope that Genesis and the appellants might be able to agree something in the next ten years. I agree with Wild J that that was "not a proper legal response" to the appellants' failure properly to engage: at [67]. It led to a decision which was contrary to the statutory purpose of sustainable management.

[170] The facts of *Ngati Rangi Trust v Genesis Power Ltd* are quite different from the present case. This is not a situation where through the parties' lack of engagement before the hearing the Environment Court has sought to provide Te Ākitai with the opportunity to bolster its case. A reading of the 2020 EnvC decision shows the Environment Court had substantial evidence before it setting out Te Ākitai's position. There were the evidential matters that were dealt with in the 2018 EnvC decision, which were either not challenged in the first appeal to this Court or which had been upheld by Muir J. Then there was supplementary evidence led at the rehearing which confirmed the position Te Ākitai took in the 2018 EnvC decision. In my view there was ample evidence from Te Ākitai about its position. What the appellants essentially complain about is that here, Te Ākitai took a first tier position which set out very clearly why it was opposed to urbanisation of the Pūkaki Peninsula. Te Ākitai did not adopt a second tier position offering some compromise for the proposals put forward by the appellants on mana whenua issues. In my view it was open to Te Ākitai to take this approach. In doing so it ran the risk that if the Environment Court did not accept its outright rejection of the appellants' proposals based on Te Ākitai's view of mana

whenua issues, Te Ākitai had no second tier position to which it could retreat. However, that was a strategic decision for Te Ākitai to take.

[171] Further, Te Ākitai would have known that the arguments it first put forward on mana whenua issues were upheld in the 2018 EnvC decision and those findings were not affected by the judgments of Muir J. In such circumstances Te Ākitai may have felt confident on its reliance on a first tier position only. Put shortly, it was open to Te Ākitai to limit its engagement with the appellants to what occurred. It cannot be a breach of natural justice for opposing parties in litigation to refuse to consult with each other as to whether they can reach a compromise position on a disputed evidential point. I am satisfied there is no basis to the arguments the appellants have advanced on the mana whenua issues. I find the mana whenua issues were dealt with comprehensively in the 2020 EnvC decision. There is nothing in that decision that suggests there is any error of law.

The Structure Plan Guidelines issue

[172] I now deal with the remaining issues that related to the Structure Plan Guidelines.

[173] Policy B.2.2.2(f) requires the decision-maker to ensure the location or re-location of the RUB boundary identifies land suitable for urbanisation in locations that follow the Structure Plan Guidelines in Appendix 1 of the AUP. The Environment Court considered that a key policy component relevant to the location of the RUB was that it achieved a "quality compact urban form" and its location was "suitable for urbanisation".[95] The Environment Court recognised that the Structure Plan Guidelines do not operate as mandatory rules or absolute criteria. Further, that even when the Structure Plan Guidelines are sufficiently addressed, Policy B2.2.2.(2) includes other matters against which a proposal to relocate the RUB is to be tested. In this way Policy B2.2.2(2) is to be seen in the context of the wider RPS and other relevant statutory considerations.

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[95] 2020 EnvC decision, above n 11, at [118].

[174] In accordance with the directions made by Muir J there was supplementary evidence in relation to the Guidelines. For the appellants, this was from Mr Scott who provided a spatial plan, Mr Maddren who addressed infrastructure issues, Mr Putt who addressed planning issues and Mr Gibb who addressed cultural/heritage issues. For the Council, supplementary evidence was provided by Mr Denny and Ms Wilson who both addressed cultural issues, Mr Brown who addressed landscape issues and Ms Trenouth who addressed planning issues.

[175] In the Environment Court's view the general theme of the evidence for the appellants on this topic was that the spatial plan and assessment provided by Mr Putt, Mr Maddren and Mr Gibb were all that was needed to satisfy the Structure Plan Guidelines. On the other hand, the Council's position was the level of detail provided in the appellants' evidence about the relevant guidelines and the relevance of this evidence to whether a greenfield site was suitable for urbanisation was insufficient in several important respects.

[176] The overall assessment of the Environment Court was that the parties' experts had identified the relevant parts of the guidelines that required assessment. However, the Environment Court was not satisfied that all of the guidelines identified had been assessed to a sufficient degree to support the spatial plan the appellants had provided.[96]

[177] Guideline 1.2 provides that the level of analysis required needs to be "appropriate to the type and scale of development". In the Environment Court's view the type and scale of development which the appellants proposed for the Pūkaki Peninsula required them to provide more evidence in respect of Guidelines 1.4.1(5), 1.4.2(2), 1.4.3, 1.4.4(2)(b) and 1.4.5. The Environment Court also considered that although Guideline 1.4.1(1) had been addressed, the evidence established that the light industry and residential zones signalled by the spatial plan when considered against Guideline 1.4.1(1) did not establish the need for additional capacity for those zonings over the likely development period.[97]

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96 At [239].
97 At [239]–[240].

[178] The Environment Court considered its conclusions on the guidelines it found were insufficiently addressed by the appellants should be placed "in the mix" with the other matters relevant to that Court's decision on whether the subject land was potentially suitable for urban development. In the Environment Court's view this assessment was not a complete reassessment of the findings made in the 2018 EnvC decision but was to be added to those matters that are no longer able to be challenged together with the reassessment required as a result of the High Court ruling.[98]

[179] Given the Environment Court found some of the guidelines were insufficiently addressed by the appellants and for other guidelines the Environment Court preferred the Council's evidence to that of the appellants it is important to traverse the assessment process in relation to those guidelines.[99]

[180] The Environment Court commenced this part of its decision with an overview of the Guidelines. It recognised that the Guidelines were part of the RPS. They promote the preparation of structure plans as a precursor to plan changes and to support four listed matters, those of relevance here being identifying greenfield land suitable for urbanisation; and rezoning of future urban zone land for urbanisation. It then generally referred to Sections 1.3, 1.4 and 1.5 before specifically addressing each section it considered relevant.

[181] Regarding Section 1.4 which sets out guidelines covering the matters to identify, investigate and address in detail, the Council's witness, Ms Trenouth, was critical of the appellants' spatial plan because in her view it revealed a number of significant issues that indicated the subject land was not suitable for urbanisation. This was because it: (a) provided insufficient justification that additional growth was needed to meet sub-regional growth projections; (b) provided no ability to improve access to the landlocked urupā; (c) did not identify or address impacts on cultural landscape; (d) was unable to address transitional impacts between residential and light industrial land uses along Pūkaki Road; (e) established a residential community with

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98 At [241].

99 I have not touched on the findings in which the Environment Court accepted the appellant had met the requirements of the guidelines.

poor access to public transport; and (f) was uncertain in respect of the costs of urbanisation.[100]

[182] Those insufficiencies caused Ms Trenouth to disagree with Mr Putt's conclusion that "there is no impediment or constraint that prevents a successful structure plan being prepared". The Environment Court then referred to Ms Trenouth's supplementary evidence and identified each of the matters set out in Section 1.4 that a structure plan was to identify, investigate and address. I deal with those guidelines which the Environment Court considered were not sufficiently addressed by the appellants' evidence below.[101]

Guideline 1.4.1(1) – urban growth

[183] Five matters were to be considered under this guideline. The 2018 EnvC decision had referred to the guideline when addressing the effectiveness of the options as it was required to do under s 32(1)(b) of the RMA. This guideline dealt with the question of future supply and demand at a sub-regional level. In the 2018 EnvC decision the Court observed that this guideline had not been covered in evidence by any party in detail. In her supplementary evidence to the rehearing Ms Trenouth had described this guideline as particularly relevant because it demonstrated whether the land was required to meet sub-regional growth projections in the short to long term. In other words, whether the urbanisation of the land was actually needed in order to achieve appropriate capacity and meet future demand for residential and business land and dwellings.

[184] The spatial plan presented for the appellants identified a total of 21.77 ha of land for light industrial activities and 20.98 ha of land for residential activities. Based on that, Mr Putt had estimated the development capacity in the spatial plan to be up to 1,000 dwellings and between 100,000 m² and 120,000 m² of light industrial floor area. He said that this would help to meet capacity for projected growth in the area.

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100 At [128]–[130].

101 The guidelines which the Environment Court found had been sufficiently addressed are not in issue in this appeal.

[185] Ms Trenouth challenged Mr Putt's methodology for determining the development capacity as being unclear. She addressed the estimates for the development capacity for the both the light industry and residential areas included on the spatial plan. She concluded that the total industrial floor area of the spatial plan was more likely to be at the lower end of Mr Putt's estimate being approximately 100,000 m^2. In relation to the proposed residential area provided for in the spatial plan, Ms Trenouth calculated a land area that would result in approximately 524 dwellings which was significantly fewer than the 1,000 estimated by Mr Putt. She also noted that Mr Putt's estimate did not account for any roading which would reduce the capacity further. Under cross-examination Mr Putt conceded that 500 dwellings was a more realistic figure than the 1,000 he had originally estimated. The Environment Court found this over-estimation to be significant and further Mr Putt's estimate took no account of land use constraints associated with development in the coastal environment.

[186] Ms Trenouth's evidence was also that dwellings that could be anticipated if Pūkaki Peninsula was urbanised would represent no more than between 0.15 per cent and 0.16 per cent of Auckland's total capacity over the likely development period. On this point her evidence was not challenged. Ms Trenouth worked on the basis Guideline 1.4.1(1) identified both supply of and demand for development capacity as first matters to be considered in the structure plan process. Further, Policy B2.2.2(1) required sufficient land that was appropriately zoned to accommodate a minimum of seven years' projected growth. Ms Trenouth's conclusion was therefore that if there was sufficient capacity available to accommodate growth and meet sub-regional growth projections, then the provision of additional development capacity on the Pūkaki Peninsula would not provide a significant justification for its urbanisation. Mr Putt had attempted to rebut this aspect of Ms Trenouth's evidence, but his rebuttal did not persuade the Environment Court. The Court could not reconcile it with Mr Putt's acceptance of evidence given by Dr Fairgray and Mr Thompson that the potential contribution of the Pūkaki Peninsula to Auckland's overall housing needs would be minimal.

Analysis

[187] The Environment Court heard evidence from Mr Putt for the appellants and Ms Trenouth for the Council. It preferred Ms Trenouth's evidence. Her unchallenged evidence was that urbanisation of Pūkaki Peninsula would represent between 0.15 per cent and 0.16 per cent of Auckland's total capacity over the likely development period. This evidence was consistent with evidence from Dr Fairgray and Mr Thompson that the potential housing contribution of Pūkaki Peninsula to overall Auckland housing needs would be limited. Mr Putt had accepted Dr Fairgray and Mr Thompson's evidence. Further, under cross-examination Mr Putt had retracted from his assessment that the subject land could provide 1,000 dwellings instead accepting that a figure of around 500 (as suggested by Ms Trenouth) was a more realistic figure.

[188] The Environment Court was clearly not persuaded by Mr Putt's evidence in relation to Guideline 1.4.1(1). The effect of Ms Trenouth's evidence led the Environment Court to conclude that the development capacity of the proposal, as estimated for both light industrial and residential areas, was not needed to achieve "an appropriate capacity to meet subregional growth projections" under the AUP.

[189] The Environment Court was satisfied it had received sufficient evidence to evaluate whether the spatial plan addressed Guideline 1.4.1(1). The question of whether the spatial plan addressed Guideline 1.4.1.(1) and whether it did so in a way that showed the urbanisation of the Pūkaki Peninsula was needed to achieve appropriate capacity to meet subregional growth projections was a factual question that the Environment Court had to decide based on the evidence before it. Given the concessions Mr Putt made under cross-examination and the support identified for Ms Trenouth's evidence it was clearly open to the Environment Court to prefer her evidence and to reject his evidence in relation to Guideline 1.4.1(1).

Guideline 1.4.2(3) – integration of green networks

[190] The 2018 EnvC decision had found there was little discussion in the evidence before that Court about the integration of the green network (in this case the estuarine system) with open space and pedestrian and cycle networks. More evidence on this topic was provided to the Environment Court on rehearing. Mr Putt had addressed

the guideline with reference to supplementary evidence from Mr Scott for the appellants. Attachment 12 of the spatial plan included 2.31 ha of planted buffers and 23.63 ha of riparian reserves including archaeological protection. However, the Environment Court noted that Mr Scott's brief of evidence did no more than to describe what this might mean. It did it not provide any detail about such green networks as for example, by identifying whether there were any ecological corridors, or how they would integrate with the proposed development. Mr Scott's supplementary evidence included a cross-section at two points depicting a very high level slip lane for commercial traffic and a separate road for domestic traffic and a separate area for walking and cycling. Mr Putt's evidence on this guideline was that:

> Throughout the development of urban facilities on Pūkaki Peninsula, pedestrian and cycling amenities will be a key design factor as a matter of modern subdivision layout.

He described such networks as being "hinted at" in Mr Scott's supplementary evidence. Mr Putt also stated that the natural character values of the Pūkaki Peninsula would be significantly enhanced by the proposed esplanade reserve management and planting regimes. The Environment Court acknowledged this but commented that there was no further detail apart from identifying such possibilities. Mr Scott also considered there was an opportunity to provide a high level of ecological and landscape amenity by providing a parallel road into the proposed light industrial area.

[191] The Council's witness, Mr Brown, provided supplementary evidence which addressed the spatial plan prepared by Mr Scott, mostly in relation to the areas of his expertise relevant to the landscape and amenity implications of that plan. However, Mr Brown commented that the "sleeving and buffering proposed would be very difficult to achieve in reality". He expressed reservations about whether Auckland Transport would support and be prepared to maintain a dual corridor roading system shown in Mr Scott's evidence. Mr Brown observed that the splitting of amenity buffers into four strip berms would limit the potential to achieve large scale screen-planting in the long term which he considered would be necessary to deal with adverse effects.

[192] The Environment Court was not satisfied that the appellants had provided sufficient detail about how to meet Guideline 1.4.2(3) at this stage of the process. It accepted the concerns Mr Brown expressed as valid, and found that further investigation was warranted to meet this part of the guideline now rather than dealing with it later.

Analysis

[193] Insofar as the Environment Court found that Guideline 1.4.2(3) was not sufficiently addressed by the appellants' evidence I consider this was a factual assessment that was for the Environment Court to make based on the evidence before it. Once it accepted Mr Brown's criticisms of Mr Putt's evidence it logically followed that it would find the appellants' evidence wanting.

Guideline 1.4.5 – urban development

[194] The relevant matter to be addressed here was Guideline 1.4.5(1). This provides that a structure plan is to identify, investigate and assess:

> (1) A desirable urban form at the neighbourhood scale including all of the following:
>
> (a) a layout providing pedestrian connectivity with a network of streets and block sizes which allow for a choice of routes, particularly near centres and public transport facilities;
>
> (b) provision of a diversity of site sizes within blocks to enhance housing choice, accommodate local small-scale community facilities and where appropriate enable a range of business activity and mixed use;
>
> (c) provision of open spaces which are highly visible from streets and of a scale and quality to meet identified community needs;
>
> (d) appropriate transitions within and at the edge of the structure plan area between different land use activities, intensities and densities; and
>
> (e) the application of an integrated stormwater management approach within developments to reduce impacts on the environment while enhancing urban amenity.

[195] Mr Putt's evidence was that details relevant to this guideline could be addressed in the next structure plan as they dealt with matters he referred to as "fine tuning". Ms Trenouth disagreed. Her opinion was that an urban form that

results in people transitioning from residential, through light industrial and then back to residential, was not a good planning outcome. She challenged the adequacy of the assessment done by Mr Putt in relation to this guideline. Mr Brown agreed with Ms Trenouth's assessment within the bounds of his expertise as a landscape architect. In his view the light industrial area proposed sat awkwardly between two much larger residential areas, and would have significant amenity effects on those living at Pūkaki, including the Pūkaki marae and papakāinga. He also considered the boundary between the light industrial area and what he described as an expanded residential sector directly west of Pūkaki crater to be arbitrary and ill-defined because no obvious topographical natural features provide the basis for it. Mr Brown had further criticisms of the plan, describing one aspect of it as blighting the bottom of the Pūkaki Peninsula currently and in his view this would be reinforced by the proposed developments.

[196] The Environment Court agreed with Ms Trenouth and Mr Brown that because of the sensitive nature of the Pūkaki Peninsula, in terms of cultural values particularly, this was a case where more detailed structural planning dealing with the proposed layout was required at this stage of the process rather than the very general indications provided by the appellants' spatial plan. Mr Putt had attempted to rebut Mr Brown's criticisms by saying that the preliminary spatial plan was a discussion document and also a high level test that Pūkaki Peninsula is capable of urban activities to some extent and a purposeful presentation of ideas to demonstrate land capability in the spatial sense. The Environment Court noted Mr Putt's rebuttal to Mr Brown's criticisms regarding the transition within the structure plan area between the proposed light industry and residential areas, but it found Mr Putt provided no details at all on the possible network of streets and block sizes and the diversity of site sizes proposed or, with the exception of coastal riparian reserves, any indication of other open spaces within the residential area. Accordingly, the Environment Court was not satisfied that sufficient work had been done to identify, investigate and address the matters contained in the guideline because of the particular nature of the land before it. In its view the spatial plan provided fell well short of proving the point of land activity capability on Pūkaki Peninsula claimed by Mr Putt.

Analysis

[197] The appellants are critical of the Environment Court for not specifying what more the appellants should have done to meet the several guidelines where their evidence was found to be insufficient. However, I consider the Environment Court has provided sufficient reasons to explain why it found the appellants' evidence insufficient and any it preferred the evidence of the Council. The Environment Court was not required to go the extra step and outline the evidence it should have received from the appellants. Further, the Environment Court's acceptance of the Council's evidence on this topic sets out a basis for why the appellants' evidence was found to be insufficient.

[198] Here the appellants provided evidence on the relevant guidelines. The Council's expert evidence was that the appellants' evidence did not go far enough to address the relevant guidelines. The Environment Court accepted the Council's evidence on this topic and gave reasons for doing so. That was all the Environment Court was required to do.

Giving effect to the RPS/other issues

[199] The Environment Court considered it needed to reconsider whether its findings in relation to the elite and prime soils issue and the evidence (including new supplementary evidence) it had heard and evaluated in relation to the Structure Plan Guidelines impacted on any of the other matters it was required to consider in order to give effect to the RPS. It concluded that it should reconsider the 2018 EnvC decision in relation to any other relevant matters contained in Chapter B2 (Urban Growth and Form), Chapter B6 (Mana Whenua), Chapter 8 (Coastal Environment) and Chapter B9 (Rural Environment). The Environment Court went on to examine and analyse those matters in detail in light of the new evidence and findings.

[200] The appellants contend in their notice of appeal that the Environment Court failed to properly consider or apply Chapters B1 and B2 of the RPS, the "overarching purpose of the RPS", and the provisions of Chapter A of the AUP. In their written submissions however the appellants state that this appeal "is about whether the Environment Court has erred in law in its approach to the elite soils

and cultural issues" and that very much reflects the approach taken to their oral argument at the hearing too.

[201] Further, it must be remembered that the majority of the 2018 EnvC decision remains intact, save for the elite soils issue, the weight to be given to mana whenua findings, and the fact additional evidence could be brought on remission for the Structure Plan Guidelines. In this context there is little the appellants could challenge in relation to outstanding matters.

[202] Accordingly there is no merit in the argument that Chapter A of the AUP and Chapter B1 of the RPS were not properly considered. Those elements of the 2018 decision were not successfully challenged on appeal to Muir J and the 2020 Environment Court was entitled to rely on the previous analysis.[102] For the same reasons I do not accept the appellants' claim that the Environment Court failed to consider or apply the overarching purpose of the RPS.

[203] Chapter B6 has already been addressed herein under the Mana Whenua issues heading. I now deal with Chapters B2 and B9 which were specifically addressed by counsel.

Chapter B2 – Urban Growth and Form

[204] The Environment Court referred to Chapter B2 which it described as containing a suite of objectives and policies addressing urban growth and form. It viewed Chapter B2 as a critical chapter in the context of considering the appropriate location of the RUB. It saw a key objective of Chapter B2 as being the promotion of a quality compact urban form. The Environment Court referred to the findings in the 2018 EnvC decision and the interim and final judgments of this Court on appeal. Relevantly the appellate judgments in this Court did not interfere with the findings in the 2018 EnvC decision relating to Chapter B2 provisions in the RPS (excluding Policy B2.2.2(j) discussed above). Accordingly, the Environment Court on rehearing worked from the basis the earlier findings remained valid and

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[102] Further both Chapters A and B1 are introductory chapters (of the AUP and RPS respectively) which do not have any relevant operative provisions.

the issue was therefore simply whether the new matters that it had heard warranted revisiting of the 2018 EnvC decision findings on the Chapter B2 provisions.

[205] The Environment Court noted that in closing for the appellants, their counsel did not mention quality compact urban form as a relevant issue. The Council had submitted that maintaining the Pūkaki Peninsula outside the RUB would give effect to the relevant higher order planning instruments and in particular would achieve a quality compact urban form. The Environment Court identified the location of the RUB as recommended by the Panel, the placement of the RUB as per the 2018 EnvC decision and subsequently the amended relief as sought by the appellants' appeal in 2020 (which placed the RUB in a different position from that recommended by the Panel as the amended relief excluded the parcel of land owned by Savannah Holdings Ltd and left it in a rural production zone).

[206] The Environment Court noted that the amended relief still failed to achieve a compact urban form. Because of the coastal environment considerations on the southwestern coast of Pūkaki Peninsula, the potential area for light industrial development was restricted. This was no different under the amended relief than the original. However, the amended relief also reduced the amount of land available for light industrial development even further because of the exclusion of the Savannah Holdings Ltd land and a proposed dual central carriageway along the Pūkaki Peninsula. The Environment Court considered these new outcomes only reinforced the concerns expressed in the 2018 EnvC decision as to the suitability of the appeal area on Pūkaki Peninsula for urbanisation.

Analysis

[207] I consider the Environment Court's findings on Chapter B2 are factual determinations on the impact of the amended relief that were open to it to make on the evidence before it. They do not raise questions that can be pursued in this appeal.

Chapter B9 – Rural Environment

[208] The Environment Court described the objectives and policies of Chapter B9 as being particularly relevant because of their focus on the outward expansion of urban

areas into productive rural land.[103] Chapter B9 identifies twin issues of protecting the finite resource of elite quality soils from urban expansion and managing subdivision to prevent undue fragmentation of large sites in ways that restrict rural production.[104]

[209] The Environment Court interpreted Muir J's judgments as only considering Chapter B9 in the context of understanding Policy B2.2.2(2)(j) and what it meant when it referred to elite and prime soils "which are significant for their ability to sustain food production".[105] The Environment Court also considered that Muir J had not made findings on whether Chapter B9 objectives and policies were relevant considerations for the decision on where to locate a RUB.[106] It therefore saw itself free to decide whether Chapter B9 was relevant to this decision.

[210] In the submissions at the rehearing the appellants did not address Chapter B9. On the other hand, the Council's stance was that Chapter B9 must be considered. The Environment Court accepted the Council's submission. The Environment Court concluded that the proposal did not meet Policy B9.3.2(2), based on its earlier findings that (a) the elite and prime soils on Pūkaki Peninsula did not constitute a de minimis remnant of highly productive land and (b) the development capacity estimated for both the light industrial and residential areas proposed in the spatial plan was not needed to achieve an appropriate capacity to meet sub-regional growth projections in the Auckland Plan.[107]

Analysis

[211] Muir J's finding is set out below in context at [77(c)]:

> [77] I am unable to accept the Environment Court's construction of this provision [Policy B2.2.2(2)(j)]. My reasons are as follows:
>
> (a) The approach too readily dismisses the Panel's interpretation of a provision for which it was itself responsible and in respect of which there was, unusually therefore, direct evidence of the drafter's intention.

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103 2020 EnvC decision, above n 11, at [356].
104 At [356].
105 At [362].
106 At [363].
107 At [370]–[372].

(b) I consider it reads too much into repetition of the word "avoiding" when, in other respects, the RPS is not a model of spare drafting (reflecting, realistically, the considerable pressure under which it was prepared).

(c) *There is in my view limited support which can appropriately be drawn from Chapter B9.3.1(1) and (2). These provisions relate to land that is outside the RUB. To then use them to support the logically antecedent inquiry about where the RUB should be located appears to me inappropriate.* In any event, on the interpretation advanced by the Panel and by the appellants there remains a significant distinction between the level of protection afforded to elite and prime soils. That is because prime soils must only be avoided "where practicable", whereas areas containing elite soils must simply be avoided. In that sense the protection/management dichotomy in B9.3.1(1) and (2) has a parallel within B2.2.2(2)(j), even on the appellant's construction.

(d) Importantly, the purpose of avoiding elite soils in RUB location or relocation cannot simply be in the service of pedology. The very basis for their protection (where they are "significant") is to sustain food production. That is confirmed by the definition of "land containing elite soil" which emphasises that it is "the most highly versatile and productive land" and is "capable of continuous cultivation". And if that is the case, then the qualification at the conclusion of 2.2.2(2)(j) is as logically relevant to elite as it is to prime soils.

(e) The Environment Court's near absolute protection is capable of producing perverse consequences, for example by preserving rural "islands" fully surrounded by urban development, or precluding land containing elite soils from inclusion within the RUB even though, for example, a reverse sensitivity analysis made it unsuitable for food production.

(f) Although the punctuation suggested as necessary by the Council would eliminate any ambiguity from the provision, it is not in my view necessary to be able to maintain the appellants' interpretation which, overall, better accords with the purposive approach which the RPS requires.

[212] Muir J's finding, as is evident from the above, was in the context of the construction of Policy B2.2.2(2)(j). That was the issue he was addressing, and the surrounding factors relate also to construction (such as wording, grammar, punctuation and purpose). The appellants' position could be inferred from Muir J's reasoning, namely that applying provisions relating to rural zoned land is jumping the gun because the question is what the appropriate zoning is. Muir J's observation that it "appears" to be inappropriate to use section B9.3 to inform the interpretation of Policy B2.2.2(2)(j) does not overturn or displace the 2018 Environment Court's finding that Objectives B9.3.1(1) and (2) were relevant to determining the location of the RUB (although it is admittedly in tension). Accordingly the decision of the Environment Court in 2018 and adopted in the 2020 decision stands.

[213] In any event I consider the Environment Court's approach was correct. The RPS is clear that it must be "read as a whole":[108]

> If an issue relates to more than one section, then the relevant objectives and policies in each section must be read together. For example, issues concerning urban growth in the coastal environment will involve consideration of sections B2 Urban Growth and B8 Coastal environment.

[214] Here, the issue relates to both the location of the RUB (engaging section B2) and the consequent (re)zoning of rural production land (engaging section B9). The decision affects land that is currently zoned rural and accordingly has associated policies and objectives. Policy B2.2.2(2) requires the relocation of the RUB to identify land "suitable for urbanisation"; if the land is currently achieving policies and objectives for rural land and would not do so under the proposed relocation this would be a factor that suggests it is not suitable for urbanisation. Conversely if the proposal would not undermine the policies and objectives of rural land this would suggest the land could be appropriately located inside the RUB. Not all policies and objectives will be directly applicable (for example, as the appellants highlight, those referring to activities) but to ignore those that are would be to ignore the directive to read all relevant parts of the RPS together.

[215] Further, even if the Environment Court was wrong to consider Chapter B9, this was not material to its decision as it had already determined that the appellants' proposal did not meet Policy B2.2.2(j) and was not needed to achieve growth capacity. Its findings in relation to Policy B9.3.2(2) were simply the conclusions it had earlier drawn under those two considerations accepted to be relevant.

Conclusion

[216] I now summarise the findings of this appeal. I find that the Environment Court correctly interpreted Muir J's findings on the construction of Policy B2.2.2(2)(j). It acknowledged that it needed to determine whether both the elite and prime soils present in the appellants' land were significant for food production in the Auckland region. It did not assume that all elite soils were significant for food production.

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[108] Auckland Unitary Plan, Regional Policy Statement at B1.5 (Objectives and Policies).

[217] I also find that the Environment Court correctly applied the law to the facts on this issue. It appropriately held that taking a purely percentage or ratio based approach, as put forward by the appellants, would be flawed because the data was variable and the basis for determining the numerical threshold for "significance" was not clear. This approach was open to it and reasonable.

[218] It accepted Muir J's findings that a simple argument of incremental loss, without first determining whether or not the land was significant for food production, was not an appropriate basis for determining the location of the RUB. Instead, the Court had regard to, but not exclusively, the context of an increasing rate of urbanisation of elite and prime soils across the Auckland region and the future projected rates.

[219] The Environment Court then took into account the character of the soils, being a contiguous area of high-quality soil, and the commercial viability, which experts assessed as viable. Accordingly the Environment Court correctly applied the assessment of whether the elite (and prime) soils were *significant* for food production, going beyond the mere qualities of elite soil itself and not resorting to mere incrementalism. In that assessment it was entitled to place weight on the available evidence as it saw fit and did so in a reasonable manner.

[220] Second, I find that no breach of natural justice occurred in relation to the Court's decision on mana whenua issues, including under Chapter B6 and the Structure Plan Guidelines. The present case is distinguished from *Ngati Rangi v Genesis Power Ltd* on the facts and because Te Ākitai presented sufficient evidence for the Environment Court to conclude the proposal did not meet mana whenua values under the various provisions. The Court was not under an obligation to ensure Te Ākitai engaged with the appellants beyond what had occurred.

[221] I also find that the Environment Court had discretion to give weight to evidence relating to this topic as it saw fit, especially in light of the fact that Muir J rejected the appellants' challenge to the findings of the Environment Court in its 2018 decision. Accordingly I find no errors of law occurred.

[222] Third, I find that the Environment Court did not err in its approach to applying the Structure Plan Guidelines. Again, its assessment of the evidence is not something this Court will disturb unless it is unreasonable. The Environment Court was not required to outline the evidence required from the appellants that would allow their proposal to succeed.

[223] Fourth, I find that the Environment Court properly gave effect to the RPS. It properly considered and applied Chapter B2 in light of the earlier findings of the 2018 EnvC decision. The Court's finding that the amended relief would not materially change matters from the 2018 EnvC decision was a factual finding available to it, including in relation to Chapter B2. Additionally, I find that the Court did not erroneously hold that Chapter B9 was relevant to the interpretation of B2.2.2(j) regarding elite soils. It correctly considered Chapter B9 to be relevant to its overall assessment under the RPS because the RPS is to be read as a whole.

[224] As a corollary of the above, it is evident that the appellants' final claim – that the Environment Court's decision was so unreasonable that no reasonable Court could have made that decision – must fail.

Result

[225] The appeal is dismissed.

[226] The parties have leave to file memoranda on costs.

Duffy J